Supreme Court, U.S.
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No. 07-

IN THE

Supreme Court of the United States

KAUFMANN'S CAROUSEL, INC., AND LORD & TAYLOR CAROUSEL, INC.,

Petitioners,

v.

CITY OF SYRACUSE INDUSTRIAL DEVELOPMENT AGENCY,

Respondent.

On Petition for a Writ of Certiorari to the New York Supreme Court, Appellate Division, Fourth Department

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the government's use of its eminent domain power to "take" selected financial provisions of a contract between department stores and a private developer to reduce the private developer's cost and risk of expanding a retail shopping mall is an inappropriate transfer of wealth between two private parties prohibited by the public use provision of the Takings Clause of the Fifth Amendment of the United States Constitution.

PARTIES TO THE PROCEEDING

The parties before this Court are Petitioners, Kaufmann's Carousel, Inc. and Lord & Taylor Carousel, Inc., and Respondent, The City of Syracuse Industrial Development Agency, a public benefit corporation organized and existing under the laws of New York and vested with the power of eminent domain. Carousel Center Company L.P. also was a party to this action before the state courts.

RULE 29.6 DISCLOSURE STATEMENT

Petitioner Kaufmann's Carousel, Inc. is 100% owned by Federated Department Stores, Inc., a publicly traded corporation.

Petitioner Lord & Taylor Carousel, Inc. is not publicly traded and no publicly held company owns 10% or more of its stock.

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PETITION FOR WRIT OF CERTIORARI

Petitioners, Kaufmann's Carousel, Inc. and Lord & Taylor Carousel, Inc., respectfully petition for a writ of certiorari to review the judgment of the New York Supreme Court, Appellate Division, Fourth Department.

OPINIONS BELOW

The opinion of the New York State Supreme Court, Appellate Division, Fourth Department (Pet. App. 2a-8a) is reported at 32 A.D.3d 1332 (4th Dept. 2006). The decisions of the Supreme Court of the State of New York in and for the County of Onondaga are not reported. The decision regarding Kaufmann's Carousel, Inc. is reproduced at Pet. App. 9a-16a, and the decision regarding Lord & Taylor Carousel, Inc. is reproduced at Pet. App. 17a-24a. The order of the New York Court of Appeals denying Petitioners' motion for leave to appeal (Pet. App. 1a) is reported at 32 A.D.3d 1340 (2006).

JURISDICTION

The judgment of the Appellate Division, Fourth Department was entered on September 20, 2006. Petitioner moved for leave to appeal to New York's Court of Appeals. By order dated October 24, 2006, the Court of Appeals denied such motion. On January 11, 2007, Justice Ginsburg signed an order extending the time for filing this petition for certorari to and including February 21, 2007. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the public use provision of the Takings Clause of the Fifth Amendment of the United States Constitution and also the Due Process Clause of the

Fourteenth Amendment of the United States Constitution. Pet. App. 41a.

STATEMENT OF THE CASE

1. A leading treatise has already declared that this case "signaled what may be a new era in condemnation strategy when it authorized condemnation of only certain elements of the leases." MILTON R. FRIEDMAN, FRIEDMAN ON LEASES § 13:2.1, at 13-12 (2003). The government, in this case, using its eminent domain authority, re-wrote contracts between a private developer and anchor department stores of a thriving retail shopping mall. At the behest of the developer who sought to secure more favorable contract terms and less expensive financing to construct a new proposed retail shopping development, the government "took" selected contract rights from the stores and imposed new obligations on them and in favor of the private developer. The government engaged in such action even though it had previously signed a contract with the department stores expressly agreeing to be bound by the terms and conditions of the stores' contracts with the developer.

The government through its eminent domain power excised from the contract, on a paragraph-by-paragraph basis, many of the stores' rights and imposed upon the stores new duties and obligations. The government, for example, took the contract provision that capped the stores' payments in lieu of taxes ("PILOT"), which has caused the developer to attempt to increase the stores' obligations immediately by approximately 76%. The government also took the contract provisions subordinating the developer's interest to that of the stores and providing the stores the right to quiet enjoyment in their buildings. As a result, the developer's financiers now may interfere with the stores' management and their spaces in the mall.

These "taken" provisions did not stand in the way of any development or have any connection to a public use. The only purpose in taking these contractual rights was to give the developer, which as described by one treatise writer "goaded" the government into exercising its eminent domain power to re-write these contracts, a financial windfall. FRIEDMAN ON LEASES, *supra* § 13:2.1, at 13-12. By taking selected contract provisions from the stores, the government allowed the private developer to impose the cost of borrowing for and the economic risk of the proposed development on the stores, without the stores' consent and in direct contravention to the parties' contractual arrangements.

The use of the government's eminent domain authority to rearrange contractual obligations so that a private developer can reduce its cost of capital serves no public purpose and is not consistent with the Public Use Clause. The Court has long held that the government cannot use its eminent domain authority to transfer wealth between two private parties. *Mo. Pac. Ry. Co. v. Nebraska*, 164 U.S. 403, 417 (1896). Nor can the government single out individuals to bear the burden of public works. *Armstrong v. United States*, 364 U.S. 40, 49 (1960). The retroactive abrogation of the parties' settled contractual obligations—including the government's own assurances and guarantees—for the sole benefit of a private entity far exceeds constitutional limitation. If the government's action in this case is allowed to stand, the Public Use Clause is a dead letter.

This Court sought to clarify the boundaries of the Public Use Clause in *Kelo v. City of New London*, 545 U.S. 469 (2005). Courts, particularly the state courts which most often deal with this issue under state eminent domain laws, however, remain confused regarding the scope of the Clause and continue to issue inconsistent and contradictory decisions. This decision alone conflicts on numerous grounds with post-*Kelo* opinions across the country.

Although *Kelo* is a fairly recent decision, additional percolation is not necessary and will not resolve the confusion. Moreover, this issue, as demonstrated by the public interest in *Kelo*, is one of national importance that warrants this Court's immediate review.

2. In 1987, Respondent, the City of Syracuse Industrial Development Agency ("SIDA"), entered into a preferred developer agreement with the Pyramid Companies ("Pyramid") to build a shopping mall called Carousel Center in Syracuse, New York. SIDA, thereafter, used its eminent domain authority to condemn 800 acres of land, leased the land to Pyramid, and issued bonds to help Pyramid finance the initial construction of the mall. Pyramid agreed to pay SIDA PILOT payments to cover SIDA's bond costs and in lieu of paying realty taxes.

Pyramid, before beginning construction of the mall, approached Petitioners, Kaufmann's Carousel, Inc. ("Kaufmann's") and Lord & Taylor Carousel, Inc. ("Lord & Taylor"), to become anchor tenants in the proposed development. After months of negotiating, Petitioners in 1991, each entered into long-term (99-year with two 50-year options to renew), non-terminable fee leases with Pyramid. R. 1196, 1197[1] (Kaufmann's Lease, ¶¶ 1.1, and 1.3); R. 1160 (Lord & Taylor Lease, §§ 1.1 and 1.2). These leases collectively provided Petitioners virtual ownership of land well beyond the confines of their buildings, approximately 11.75 acres (or nearly 20% of the mall), and guaranteed that Petitioners could each purchase their land for $2. R. 1170-71, 1207-08. Petitioners put their names behind the project and invested tens of millions of dollars to build their stores. Only after Petitioners agreed to anchor Carousel Center did Pyramid begin building the rest of the mall.

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[1] Pages from the record filed with the New York Supreme Court, Appellate Division are herein designated as "R."

To secure Petitioners' involvement and investment, Pyramid committed to numerous contractual assurances designed to protect Petitioners' interests and to ensure that Petitioners would have a substantial say in the future development of Carousel Center. For example, Pyramid agreed it would not make any changes to the mall absent Petitioners' consent. *E.g.*, R. 916-18. Petitioners were granted exclusive possession of their buildings and the right of quiet enjoyment of their premises, and Petitioners were granted title to the buildings constructed at their expense, including any tax benefits associated with ownership of the buildings. R. 1165-66, 1202. Pyramid also agreed that its right to finance the mall would be subordinate to Petitioners' Leases. R. 1165, 1201-02.

One provision that was of utmost importance to Petitioners and Pyramid was the calculation of PILOT payments. Petitioners agreed to pay a fixed percentage of the PILOT payments based on the square footage of Carousel Center Mall as it existed at the time of contracting. These payment obligations specifically were capped by the contract: "Developer will not amend, modify or terminate provisions of the PILOT Agreement relating to payments due thereunder so as to increase [Petitioners'] obligations thereunder." R. 1125, 1149.

Petitioners, as a pre-condition to investing tens of millions of dollars to anchor Carousel Center, secured parallel commitments from SIDA. SIDA, as owner of the property upon which the mall was located, guaranteed that it would not interfere with Petitioners' operations of their stores. SIDA, thus, agreed to all of the terms, covenants, conditions, and requirements contained in Petitioners' contracts with Pyramid and agreed that it would "not disturb or in any way adversely affect" Petitioners' rights under their leases. *Kaufmann's Carousel, Inc. v. City of Syracuse Indus. Dev. Agency*, 301 A.D.2d 292, 295, 750 N.Y.S.2d 212, 215 (2002)

(reproduced in Pet. App. 25a-40a). SIDA further agreed "to subordinate its interest in Carousel Center to the terms, covenants, and conditions of the [other transaction documents] between Pyramid, Kaufmann's and Lord & Taylor." *Id.* at 297; Pet. App. 30a.

Pyramid, in 1993, shortly following the opening of Carousel Center, approached SIDA about building another project. Pyramid envisioned another retail shopping mall not far from Carousel Center that would be known as Carousel Landing Mall. SIDA agreed to assist Pyramid, and in 1995, issued a Determination and Findings of Fact to condemn 55.7 additional acres of land owned by various oil companies. *See Mobil Oil Corp. v. City of Syracuse Indus. Dev. Agency*, 224 A.D.2d 15, 645 N.Y.S.2d 741, *appeal dismissed*, 89 N.Y.2d 860, *leave denied*, 89 N.Y.2d 811 (1996).

Before the Carousel Landing condemnation proceeding was complete, Pyramid, in 1997, approached SIDA with an even bigger proposed development that combined Carousel Center and Carousel Landing. The new development would be three times the size of the present mall and would be known as DestiNY USA. This development as then advertised would include hotels, a golf course, a water park and a replica Tuscan Village.

Notwithstanding Pyramid's and SIDA's agreements with Petitioners, Pyramid "goaded" SIDA into instituting eminent domain proceedings against certain of Petitioners' interests in the mall. FRIEDMAN ON LEASES, *supra* § 13:31, at 13-12. These proceedings purportedly were necessary because the proposed DestiNY USA development would encompass Carousel Center. On April 30, 2002, SIDA held a public hearing where it announced that the proposed development "would serve public purposes, 'including, without limitation, advancing job opportunities, general prosperity and public welfare of the People of the State of New York and the City

of Syracuse and . . . advancing economic development and promoting tourism.'" *Kaufmann's Carousel, Inc.*, 301 A.D.2d at 295; Pet. App. 27a-28a.

SIDA announced that two categories of property interests were to be condemned to accomplish this expansion. The first category consisted of "right-of-way" interests. These interests, according to SIDA, were "needed," *inter alia*, to make infrastructure improvements, allow construction of roadways, permit pedestrian access, and improve aesthetic conditions. 301 A.D.2d at 295; Pet. App. 28a. The second category of interests was composed of, *inter alia*, "interests of tenants pursuant to leases or other agreements" that could restrict the use of the mall, for example, the expansion or demolition of certain parking lots or the alteration of interior decor. 301 A.D.2d at 296; Pet. App. 28a. SIDA concluded that the condemnation of these interests "will help achieve the public purposes, uses and benefits expected to be derived from the DestiNY USA Project . . . and will independently help achieve the public purposes, benefits and uses associated with the potential redevelopment." 301 A.D.2d at 296; Pet. App. 28a-29a (internal quotation marks omitted).

Petitioners thereafter filed an original proceeding in the New York appellate court challenging SIDA's Determination and Findings of Fact. Petitioners contended, in part, that the condemnation of particular lease provisions—lease provisions that SIDA and Pyramid agreed to as a necessary inducement to Petitioners' presence as anchor tenants—would leave Petitioners with materially different contract rights and that no public purpose would be served. The court denied the challenges, holding that SIDA may exercise its eminent domain authority so long as just compensation was paid. 301 A.D.2d at 299; Pet. App. 36a-38a. The New York Court of Appeals denied Petitioners' motion for leave to appeal.

In December 2005, SIDA instituted condemnation proceedings against certain of Petitioners' leasehold rights based on the April 30, 2002 Determination and Findings of Fact. SIDA enumerated interests that it sought to condemn, including (i) all rights to restrict, control, or impede the exterior or interior layout of that portion of the mall located outside of Petitioners' stores, (ii) all rights to restrict or control in any way the use or location of that portion of the mall located outside of Petitioners' stores, (iii) all rights to use or occupy that portion of the mall outside of Petitioners' stores, and (iv) all other rights Petitioners may have which either SIDA, Pyramid, the Court, or Petitioners may later decide constitutes a Carousel Center Interest. R. 16-17, 58-59; Pet. App. 13a-15a, 21a-23a.

SIDA also sought to condemn certain "financing" provisions. SIDA sought to take "any rights which restrict or otherwise adversely affect in any way any contemplated SIDA payment-in-lieu-of-tax ('PILOT') or financing structure for DestiNY USA, including without any limitation, any restriction on the amount required to be paid as a PILOT." R. 17, 59; Pet. App. 14a, 22a. In addition to the contractual cap on PILOT payments, SIDA specifically sought to take the following provisions which might interfere with any financing Pyramid ultimately might be able to obtain for its proposed development:

- "[Petitioners'] Leases: Article 12." R. 17, 59; Pet. App. 14a, 22a. Article 12 is a one-paragraph subordination provision that provides in relevant part in each lease: "This Lease shall at all times during the term hereof be prior to any financing of Landlord's interest in the Demised Premises. Landlord covenants and agrees that it shall not mortgage or otherwise finance its interest in the Demised Premises except in such a manner that it is and shall always remain subordinate to this Lease." R. 1165, 1201-02.

- Petitioners' Leases: "Section[s] 13.1." R. 17, 59; Pet. App. 14a, 22a. These sections provide Petitioners the right to construct, erect, modify or improve their stores. R. 1165, 1202.
- Petitioners' Leases: "Section 13.3." R. 17, 59; Pet. App. 14a, 22a. These sections grant Petitioners title to all buildings and improvements on their premises throughout the term of the leases, including all tax benefits accruing as a result of such ownership. R. 1166, 1202.
- "Construction, Operation and Reciprocal Easement Agreement: § 15.2." R. 17, 59; Pet. App. 14a, 22a. This section grants, *inter alia*, Petitioners the right to finance their interest in the mall through mortgage or other means. R. 919.
- Construction, Operation and Reciprocal Easement Agreement: "§ 15.3." R. 17, 59; Pet. App. 14a, 22a. Pyramid agreed in this section, *inter alia*, that if it transferred its interest "to a Person who does not have experience managing regional shopping centers reasonably satisfactory to the [Petitioners], such Person shall be obligated and shall agree as a condition of the transfer to engage a manager with management experience reasonably satisfactory to the [Petitioners] to manage and operate the Center on behalf of such Person." R. 921.
- Construction, Operation and Reciprocal Easement Agreement: "§ 25.23." R. 17, 59; Pet. App. 14a, 22a. This provision requires that the original parties shall remain parties to the agreement, even after one party has transferred its interest to another, unless and until it provides notice to the other parties and the successor in interest accepts the designation as the Party. R. 943.

The effect of taking these "financing" provisions would be to remove all restrictions on Pyramid's ability to sell or use Carousel Center Mall to finance other projects. These provisions do not preclude any developer, including Pyramid, from proceeding with DestiNY USA; they only restrict Pyramid's ability to use Petitioners' interests as collateral or other means to finance its proposed venture. SIDA, nonetheless, did not provide any justification in addition to its April 2002 Determination and Findings of Fact for condemning these interests, notwithstanding that the 2002 Determination never mentioned these financial provisions.[2]

Petitioners challenged SIDA's authority to condemn their contract rights. Petitioners contended that no public purpose was served and that no authority justified the excision of many rights, while preserving and increasing their obligations to Pyramid. *See* R. 322 ("How can a public purpose necessitate subjecting [Petitioners] to any PILOT arrangement the developer might choose to negotiate at any time in the future?"); R. 328 ("[Petitioners have] not been able to unearth any case addressing any effort to use eminent domain to parse leasehold rights and obligations in this manner, and it can find no authority addressing a circumstance where a condemnor has sought to use eminent domain to segment the obligations of a leasehold interest from its benefits."); R. 652 (a condemnor's "power to take is not the power to rewrite the documents"). The trial court granted SIDA's condemnation petition, stating, without explanation, that SIDA "is [not] taking any more than is necessary for the DestiNY USA project." Pet. App. 15a,

[2] Although all of these provisions were essential to Petitioners' original agreements with Pyramid, they are inherently difficult to value and are subject to severe undervaluation. SIDA only offered Kaufmann's $20,500 and Lord & Taylor $27,500, as compensation for the acquisition of *all* of their respective interests, including the financing provisions. R. 326, 352-61.

23a. Petitioners appealed to the Appellate Division, which affirmed in a short, divided opinion. Pet. App. 2a-8a.

Petitioners, thereafter, filed a motion for leave to appeal in the New York Court of Appeals. Petitioners reasserted constitutional arguments that the Court of Appeals declined to review in the 2003 motion for leave to appeal. Petitioners, in their 2006 motion for leave, cited *Kelo v. City of New London*, 545 U.S. 469, contending the taking at issue here is far more novel and breath-taking. The New York Court of Appeals denied Petitioners' motion for leave to appeal in a one-line order. Pet. App. 1a.

REASONS FOR GRANTING THE PETITION

This case presents an extraordinary exercise of the sovereign power of eminent domain. At the behest of a private developer who had contracted with Petitioners, the government exercised that power to impose greater contractual obligations on Petitioners through a paragraph-by-paragraph alteration of the contracts with the developer. SIDA, contrary to its own agreement with Petitioners, re-arranged the existing economic rights between private parties, eliminated Petitioners' consent rights, and, in effect, compelled Petitioners to bear the financial burdens and risks of the proposed redevelopment. Petitioners are now bound by the re-written contracts that the government forced upon them, with greatly diminished rights, but with no reduction in their obligations. In short, SIDA used eminent domain to foist upon the existing anchor mall tenants the financial burdens associated with the developer's proposed expansion solely for the developer's private benefit.

First, such an overreaching use of eminent domain cannot be squared with the Constitution's Public Use Clause. In *Kelo*, the government had a public purpose for the taking—condemning the affected property was needed to create a development that served the public interest. Here, in

contrast, no public purpose is served by the exercise of eminent domain because there is no justification for taking Petitioners' *financial* rights, as such takings are wholly unnecessary to build DestiNY USA. These rights did not preclude or restrict further development; the developer's proposed mega-mall could be built in exactly the same way whether or not these provisions were excised. The only purpose served by taking provisions such as the cap on PILOT payments or the subordination clause was to reduce the developer's costs, by forcing Petitioners to assume the financial risks of the developer's proposed expansion. Increasing a corporation's ability to *finance* new development by re-writing existing contracts to enhance the developer's coffers is simply a naked wealth transfer between well-heeled entities. Robbing Peter to pay Paul inherently cannot constitute a *public* purpose under any conception of that term.

Second, unlike the carefully crafted and considered development plan in *Kelo* where this Court held that a public-private venture did not raise any concerns of illegitimacy or favoritism, the takings at issue here were proposed by the private developer and required the government to abrogate its own agreements with Petitioners. Even if reducing the developer's cost of capital and spreading its financial risk could constitute a public use in some circumstances, the government, by providing such financial benefits in this case at the behest of a specific private developer, overstepped its constitutional authority.

The courts, following *Kelo*, remain confused over the scope of the Public Use Clause, issuing inconsistent decisions and reaching inconsistent results. This case provides a good vehicle for the Court to alleviate the confusion and provide a clear doctrinal basis to determine compliance with the Public Use Clause. Moreover, as demonstrated by the public reaction following *Kelo*, the

scope and correct application of the Public Use Clause is a matter of national importance that warrants this Court's immediate review.

In particular, it is important to clarify that there are some cognizable limits on government's potentially tyrannical power to take one's property and retroactively abrogate settled contractual rights. As the leading treatise in this area has already noted, this case heralds a "new era in condemnation strategy." FRIEDMAN ON LEASES, *supra* § 13.2.1, at 13-12. Since the Constitution plainly does not permit pursuing the illegitimate end of naked economic favoritism, particularly when done through the illegitimate means of selectively re-writing contracts, the Court should ensure that this "new era" never takes root.

A. The Government's Taking Of Petitioners' Financial Contractual Rights Bestowed A Purely Private Benefit On A Private Developer And Was Unconnected To Any Public Purpose.

The public use requirement promotes security of property as well as "[t]he concepts of 'fairness and justice'" underlying the Takings Clause. *See Kelo*, 545 U.S. at 497 (O'Connor, J., dissenting) (citing *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 326 (2002)). As this Court emphasized in *Kelo*, "it has long been accepted that the sovereign may not take the property of *A* for the sole purpose of transferring it to another private party *B*, even though *A* is paid just compensation." *Id.* at 477; *see also Mo. Pac. Ry. Co.*, 164 U.S. at 417 (holding that the government may not take a corporation's land for the erection of a grain elevator for a selected number of individuals). The Court further explained, "Nor would the City be allowed to take property under the mere pretext of a public purpose, when its actual purpose was to bestow a private benefit." *Kelo*, 454 U.S. at 477.

Justice Kennedy, who provided the fifth vote in *Kelo*, expressly stated in his concurrence that the courts were not to rubberstamp the decisions of government agencies. He noted "that a rational-basis standard of review is appropriate does not . . . alter the fact that transfers intended to confer benefits on particular, favored entities, and with only incidental or pretextual public benefits, are forbidden by the Public Use Clause." *Id.* at 490; *see also City of Cincinnati v. Vester*, 281 U.S. 439, 446 (1930) ("It is well established that . . . the question [of] what is a public use is a judicial one."). The government simply cannot take an individual's property by asserting some general public purpose if that taking is unrelated or peripheral to any legitimate public purpose. *Cf. Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 837 (1987) (holding "the lack of a nexus" between the exaction of an easement and the stated public purpose of retaining a view of the beaches "converts that purpose to something other than what it was").

Indeed, in all contexts relating to the various constitutional provisions protecting property rights, the Court has consistently made clear that retroactively undoing settled contract rights for the purpose of aiding one contracting party is, by definition, not a legitimate public purpose. For example, the Court in *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234 (1978), held that the Constitution precluded the government from singling out and abrogating an individual contract between two private entities. There, the Minnesota legislature retroactively imposed new obligations on employers' pension funding requirements that instantly rendered the petitioner's plan underfunded. The Court struck down "the statute in question [as it] nullifie[d] express terms of the company's contractual obligations and impose[d] a completely unexpected liability in potentially disabling amounts." *Id.* at 247. Relying on decisions in *W. B. Worthen Co. v. Thomas*, 292 U.S. 426 (1934); *W. B.*

Worthen Co. v. Kavanaugh, 295 U.S. 56 (1935); and *Treigle v. Acme Homestead Ass'n*, 297 U.S. 189 (1936),[3] this Court held that the retroactive alteration did not "meet an important general social problem," particularly since it had an "extremely narrow focus" on a handful of companies. 438 U.S. at 243, 247-48. Similarly, in *Thompson v. Consolidated Gas Utilities Corp.*, 300 U.S. 55 (1937), the Court struck down Texas' effort to curtail natural gas production by certain wells in order to benefit owners of other wells. Emphasizing that the Court "has many times warned that one person's property may not be taken for the benefit of another private person without a justifying public purpose, even though compensation be paid," the Court struck down this attempted wealth transfer because the "use of the [plaintiff] pipe line owner's wells and reserves is curtailed solely for the benefit of other private well owners." *Id.* at 80, 78.

As these cases reflect, government actions that impair vested rights or impose new duties on past transactions—particularly when focused on specific individuals—raise serious concerns under "several provisions of our Constitution," including the Takings Clause, the Ex Post Facto Clause, the Contracts Clause, and prohibitions of "Bills of Attainder." *Landgraf v. USI Film Prods.*, 511 U.S. 244, 266 (1994). These general anti-retroactivity concerns are heightened when the government's actions "affect[]

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[3] In *Treigle*, the Court invalidated a Louisiana law that restricted the existing withdrawal rights of the members of a building and loan association: "The statute merely attempts, for no discernable public purpose, the abrogation of contracts between members and the association lawful when made." 297 U.S. at 196. In *Thomas*, the Court invalidated an Arkansas law that exempted the proceeds of life insurance policies from collection by the beneficiary's judgment creditors, 292 U.S. at 429-30, 434, and, in *Kavanaugh*, the Court struck down another Arkansas law that retroactively eliminated the value of mortgage benefit securities, 295 U.S. at 57-58, 62-63.

contractual or property rights, matters in which predictability and stability are of prime importance." *Id.* at 271.

Such selective, retroactive government action "presents problems of unfairness . . . because it can deprive citizens of legitimate expectations and upset settled transactions." *Gen. Motors Corp. v. Romein*, 503 U.S. 181, 191 (1992); *see also E. Enters. v. Apfel*, 524 U.S. 498, 548 (1998) (Kennedy, J., concurring in the judgment) (retroactivity is of "particular concern" because of the "'tempt[ation] to use retroactive legislation as a means of retribution against unpopular groups or individuals.'" (quoting *Landgraf*, 511 U.S. at 266)). The Court, accordingly, has required any retroactive effect to be proportional to the individual's past conduct and to have a "connection" to that past conduct. *Kelo*, 545 U.S. at 491-93 (Kennedy, J., concurring). Thus, the Court in *Eastern Enterprises* struck down a statute (a plurality on Takings Clause grounds, with Justice Kennedy concurring on substantive due process grounds) that would have retroactively imposed disproportional liability on a company that had long exited the industry. This Court has not allowed the government to foist new obligations upon a party and to impair a party's existing rights unless justified by an overriding public interest or the party's own conduct. *See Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 18 (1976). Indeed, singling out individuals to sacrifice contractual or other property rights is directly at odds with the basic purpose of the Takings Clause, which is to "prevent[] the public from loading upon one individual more than his just share of the burdens of government." *Monongahela Navigation Co. v. United States*, 148 U.S. 312, 325 (1893); *see also Armstrong*, 364 U.S. at 49 (The fundamental purpose of the Takings Clause is "to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.").

The government's interference with vested contractual rights here is particularly indefensible because it undoes the government's *own* agreements with Petitioners. "There is a clear distinction between the power of the [government] to control or interdict the contracts of private parties when they interfere with the exercise of its constitutional authority and the power of the [government] to alter or repudiate the substance of its own engagements." *Perry v. United States*, 294 U.S. 330, 350-51 (1935). In *United States Trust Co. v. New Jersey*, 431 U.S. 1, 26 (1977), for example, the Court concluded that the State could not constitutionally take security provisions of a contract that "limited the [government's] deficits and thus protected the general reserve fund from depletion." *Id.* at 19. Although the government's reneging on its commitments indisputably served important public goals involving "[m]ass transportation, energy conservation, and environmental protection," the government's ability to abrogate contracts does not turn on "a utilitarian comparison of public benefit and private loss." *Id.* at 28. Rather, the government was required to show that its action was "both reasonable and necessary to serve the admittedly important purposes claimed by the States." *Id.* at 29; *see also Lynch v. United States*, 292 U.S. 571, 580 (1934) ("To abrogate contracts, in the attempt to lessen government expenditure, would be not the practice of economy, but an act of repudiation."); *Perry*, 294 U.S. at 351 ("[I]f [governments] repudiate their obligations, it is as much repudiation, with all the wrong and reproach that term implies, as it would be if the repudiator had been . . . a citizen." (internal quotation marks omitted)).

Here, the State's action plainly singled out Petitioners and retroactively abolished their contractual rights in order to benefit another private entity, so it plainly could not further a "*public* use" absent some overriding public interest or special justification. The New York courts nevertheless

refused to even examine the public purpose served by the *taking—i.e.*, the condemnation of Petitioners' contract rights—but only looked at whether the proposed development, writ large, served such a purpose. This is the wrong question and necessarily yields the wrong answer. There is an obvious and fundamental difference between takings which aid *development* and takings which simply aid a *developer*. Here, the taking served no purpose other than assisting SIDA's previously-selected developer by coercing the developer's current contracting partners into providing greater financial and other support than they had bargained for.

This is plainly contrary to the Public Use Clause and not remotely justified by *Kelo*. The fact that condemning private property in New London served a public purpose, because it was needed for Pfizer's proposed development, in no way suggests that the town could have re-written Pfizer's contracts with others in order to enhance Pfizer's fiscal situation. For the same reason, rearranging Pyramid's contractual relations with Petitioners to enhance its financial position cannot serve a public purpose under *Kelo*.

Specifically, SIDA took "financing" provisions that on their face have no conceivable nexus to a legitimate public use. For example, SIDA took the subordination clause, which subordinated Pyramid's right to mortgage the property to Petitioners' agreements; SIDA took the contractual section requiring the original parties to these agreements to remain parties following a transfer of their interests unless the successor accepts the role of a party; and SIDA took the contractual provision which required Pyramid to sell its interest to an experienced shopping mall manager or at least engage a manager with significant management experience. None of these provisions stood in the way of Pyramid or any other developer from proceeding with DestiNY USA; they

simply increased Pyramid's costs and required Pyramid to bear the economic risk of its proposed development.

SIDA, by taking these provisions, thus conscripted Petitioners to be Pyramid's junior partners, and forced Petitioners to assume the risk in Pyramid's proposed expansion by helping underwrite it with, among other things, increased PILOT payments. Petitioners are still bound by their contracts and required to stay in Carousel Center Mall. But, instead of assisting with Pyramid's initial financing of the Carousel Center Mall—which Petitioners agreed to do provided their obligations never exceeded the pre-determined cap--SIDA seeks to force Petitioners to underwrite Pyramid's proposed development of a gargantuan tourist center. Pyramid has attempted to increase Petitioners' PILOT payments by approximately 76% to finance the proposed development, which has yet to even begin. Nor do Petitioners have any clear ability to reduce their risk or exposure from Pyramid's risky and substantial development. SIDA's imposed contractual arrangement threatens the very economic viability of the stores. Petitioners' business models, assumptions, and projections were all based upon the contracts that they had with Pyramid and SIDA. The end result is that Petitioners are obligated to a long-term contract to which they never agreed or ever would have agreed and are forced to bear the uncertainty and risk imposed upon them while Pyramid, insulated from such risks, stands to receive any and all rewards from the project.

In short, this Court should grant certiorari to reaffirm that the Constitution requires a nexus between the asserted legitimate public purpose and the specific property right. Following *Kelo*, the broad-based perception that the Court gave unwarranted leeway to benefit private developers has prompted widespread amendments to state eminent domain laws, and many states have sought to amend their statutes to assure that the sovereign power of eminent domain is not

exploited to transfer property from one private party for the benefit of another private party.[4] This Court should grant certiorari to make clear that the government cannot abuse the wide-ranging discretion that *Kelo* provides by taking property or rights that are not legitimately connected to a public use. If the taking of certain contract rights to reduce a specific private developer's cost of capital and economic risk qualifies as a public use, then it is hard to imagine a public-private venture that would violate the Public Use Clause. These issues are of fundamental importance and warrant immediate review.

B. The Government's Actions Demonstrate Impermissible Favoritism Contrary To *Kelo*.

SIDA's symbiotic and pre-existing relationship with Pyramid independently demonstrates that no part of its taking was for a public purpose. The taking at issue in *Kelo* was affirmed because it was "executed pursuant to a 'carefully considered' development plan and there was no evidence of an illegitimate purpose." 545 U.S. at 478. In such limited circumstances, the Court held that the public use requirement did not preclude the government from using its eminent domain authority to condemn land pursuant to a comprehensive redevelopment, even if that land was transferred to a private entity. As this Court noted, where the redevelopment plan exists before a private developer enters the picture, "[i]t is, of course, difficult to accuse the

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[4] *E.g.*, Ala. Code § 11-47-170; Alaska Stat. § 09.55.240; Colo. Rev. Stat. § 38-1-101; 29 Del. Code Ann. § 9505; Fla. Stat. § 73.014; Ga. Code Ann. § 22-1-1; Idaho Code Ann. § 7-701A; Ill. Comp. Stat. § 3/5-5-5; Ind. Code § 22-13-2-1.5; Iowa Code §§ A.21 & 6A.22; Kan. Stat. Ann. §§ 12-306, 24-438, 24-467, 26-501, 26-507, and 72-8212(a); Ky. Rev. Stat. Ann. § 416.540; La. Const. Article 1, § 4(G); Me. Rev. Stat. Ann. § 816; Minn. Stat. §§ 117.025 & 117.027; Mo. Rev. Stat. § 523.271.1; Neb. Rev. Stat. § 76-701; N.H. Rev. Stat. Ann. § 162-K:2; N.C. Gen. Stat. § 40A-1; Ohio Const. Art. § 19; 26 Pa. Cons. Stat. § 204; Vt. Stat. Ann. tit. 12, § 1041.

government of having taken *A*'s property to benefit the private interests of *B* when the identity of *B* was unknown." *Id.* at 478 n.6.

The Court, however, made clear that the government was strictly prohibited from transferring citizen A's property to citizen B because citizen B will put the property to better use. "Such a one-to-one transfer of property, executed outside the confines of an integrated development plan, is not presented in this case." *Id.* at 487. The Court held that "such an unusual exercise of government power would certainly raise a suspicion that a private purpose was afoot." *Id.*

The unusual exercise of government power in this case leaves no doubt that a private purpose was afoot. SIDA did not create a "carefully considered redevelopment plan," designed to help the citizens of New York through the construction of DestiNY USA. Indeed, SIDA, in its contracts with Petitioners, expressly agreed that Carousel Center would not be expanded without Petitioners' consent and that further expansion was not part of some larger plan. As SIDA has admitted, Pyramid, not SIDA, came up with the ideas for both the Carousel Landing and the DestiNY USA projects, and Pyramid approached SIDA to ask for its assistance in developing the projects. And, SIDA, in exercising its eminent domain authority, did not condemn Petitioners' contractual rights to allow just any redevelopment to take place. SIDA specifically exercised its authority to take "any rights which restrict or otherwise adversely affect in any way any contemplated SIDA payment-in-lieu-of-tax ('PILOT') or financing structure for *DestiNY USA*," thereby assuring that only Pyramid, the force behind and developer of DestiNY USA, could profit from its actions. R. 17, 59 (emphasis added); Pet. App. 14a, 22a. SIDA unsurprisingly refers to Pyramid as "its private developer." R. 252, ¶ 8.

In short, SIDA did not form a task force to investigate redevelopment alternatives, it did not generate a plan based on community inputs other than from a specific developer, and it never sought to implement any plan by recruiting multiple potential developers. Rather, in flagrant abuse of its governmental power, SIDA used its eminent domain authority to excuse itself and Pyramid from contractual obligations to which they had previously agreed so that Pyramid could create its mega-plex mall.

Given the suspicious circumstances under which SIDA exercised its eminent domain authority and the obvious private financial benefit to Pyramid, the entire condemnation—even those provisions that might otherwise arguably be related to a public purpose or necessary for the construction of DestiNY USA—should be subjected to heightened scrutiny. This is precisely the type of case that Justice Kennedy warned of when he said "[t]here may be private transfers in which the risk of undetected impermissible favoritism of private parties is so acute that a presumption (rebuttable or otherwise) of invalidity is warranted under the Public Use Clause." *Kelo*, 545 U.S. at 493 (Kennedy, J., concurring) (citing *E. Enters.*, 524 U.S. 498 (Kennedy, J., concurring in judgment)).

C. There Is Confusion And Conflict Among The Courts Regarding How To Define And Analyze Public Use In These Circumstances.

The decision by the New York appellate court exacerbates the inconsistent application of the Public Use Clause that continues to exist following *Kelo*. In jurisdictions around the country, courts are reaching inconsistent, irreconcilable results based on similar facts. Some courts, like the New York courts here, have dismissed any concern about the possibility of self-dealing and have allowed the government free rein to use its eminent domain authority, so long as the government purports to advance some public interest. *See,*

e.g., *HTK Mgmt., L.L.C. v. Seattle Popular Monorail Auth.*, 121 P.3d 1166, 1176-77 (Wash. 2005).

Other courts, both before and after *Kelo*, have required the government to demonstrate a causal connection between the taking and the alleged public use, particularly where, as here, it condemned existing contract rights. The Rhode Island Supreme Court, in *Rhode Island Economic Development Corp. v. Parking Co.*, 892 A.2d 87 (R.I. 2006), for example, held that an attempt by a state economic development corporation to selectively re-write contract terms in its own favor—condemning an easement in a parking garage instead of exercising its option to purchase that easement—did not qualify as a public use. The court held that the government had "altered the balance of bargaining power in its favor and was able to achieve in Superior Court the concessions it was unable to obtain from [the corporation]." *Id.* at 106. This opinion by the Rhode Island Supreme Court simply cannot be squared with the New York courts' decisions in this case. *See also MHC Fin. Ltd. P'ship v. City of San Rafael*, No. 00-3785, 2006 WL 3507937, *14 (N.D. Cal. Dec. 5, 2006) (denying City's motion for summary judgment because the City proffered no evidence that its rent control statute was in the public interest, "thereby inviting the court's inference that the ordinance simply confers a private benefit on the incumbent tenants").

Moreover, the courts, following *Kelo*, evidence considerable confusion on just how selective private favoritism should be discerned and analyzed. *See, e.g.*, *W. Seafood Co. v. United States*, No. 04-41196, 2006 WL 2920809, *5 (5th Cir. Oct. 11, 2006) (declining to address whether a heightened standard of review is necessary in cases where favoritism is present because the facts of the instant case did not warrant it). In *Didden v. Village of Port Chester*, 173 F. App'x 931, 933 (2d Cir. 2006), *cert. denied*, 75 U.S.L.W. 3267 (U.S. Jan. 16, 2007) (No. 06-652), the

Second Circuit affirmed the taking of property located within a redevelopment area because the location within a redevelopment district purportedly insulated transfers—even transfers for admittedly private use—from constitutional infirmities. In contrast, the court in *99 Cents Only Stores v. Lancaster Redevelopment Agency*, 237 F. Supp. 2d 1123 (C.D. Cal. 2001), *appeal dismissed as moot*, 60 F. App'x 123 (9th Cir. 2003), rejected an attempted taking (although within the physical limits of a redevelopment area) because "the evidence is clear beyond dispute that [the redevelopment agency's] condemnation efforts rest on nothing more than the desire to achieve the naked transfer of property from one private party to another." *Id.* at 1129. *Kelo* itself favorably cited the *99 Cents* case as an example of where courts have struck down the "unusual" and "suspicio[us]" use of government power to effect a "one-to-one transfer of property." *Kelo*, 545 U.S. at 487 & n.17. Similarly, a Pennsylvania court recently struck down a taking within a "blighted" area because the specific parcel of land was taken at the request of a private school and "nothing in the Constitution authorizes a taking of private property for a private use." *In re Redevelopment Auth. of City of Philadelphia*, 891 A.2d 820, 828 (Pa. Commw. Ct.), *appeal granted*, 903 A.2d 539 (Pa. 2006). Again, these cases' invalidation of takings done at the behest of, and in order to benefit, certain private parties cannot be squared with the approval here of a condemnation to benefit Pyramid.

Finally, and most generally, courts are divided on the related question of the extent to which government needs to provide a reasoned justification for its takings. Here, as in *Didden*, the courts did not require the government to provide any justification or explanation of the precise taking at issue,

but only to establish that the development as a whole serves a general public interest.[5]

This generic explanation is plainly insufficient under the precedent this Court cited in *Kelo*, as well as lower court decisions that require a specific and meaningful justification for a taking. *See Kelo*, 545 U.S. at 487 n.17 (citing *Vester*, 281 U.S. 349 ("taking invalid under state eminent domain statute for lack of a reasoned explanation")); *Daniels v. Area Plan Comm'n*, 306 F.3d 445, 463 (7th Cir. 2002) (holding that exercise of eminent domain was unconstitutional where claim of economic development was "conclusory and largely unsupported"); *S.W. Ill. Dev. Auth. v. Nat'l City Envtl., L.L.C.*, 768 N.E.2d 1, 10-11 (Ill. 2002) (holding that condemnation for racetrack expansion was not a public use, even though it would contribute to economic growth in the region); *see also MHC Fin. Ltd. P'ship*, 2006 WL 3507937, at *14 (requiring the government to present evidence of public purpose).

This Court should grant certiorari to clarify the circumstances in which the government's proffered public use is legitimate or warrants a more searching standard of review. This issue is recurring and is the subject of inconsistent application in the state and lower federal courts.

[5] Other courts have placed impossible burdens of proof on plaintiff to demonstrate the absence of a public purpose, requiring, for example, clear and convincing evidence of arbitrariness. *See, e.g., C/S12th Ave. LLC v. City of New York*, 32 A.D.3d 1, 11, 815 N.Y.S.2d 516, 525 (2006) ("[O]ur review is limited to ascertain whether the project is *rationally related* to a conceiveable public purpose." (emphasis in original)); *Norfolk Redevelopment & Hous. Auth. v. C & C Real Estate, Inc.*, 630 S.E.2d 505, 509 (Va. 2006) (requiring plaintiff to present clear and convincing evidence that locality acted arbitrary in determining public purpose); *City of Long Branch v. Brower*, Nos. Mon-L-4996-05, *et al.*, 2006 WL 1746120, *10 (N.J. Super. Ct. June 22, 2006) ("A challenger can overcome a presumption of validity only by proofs that there could be no set of facts that would rationally support a conclusion that the enactment is in the public interest.").

This case, in which the favoritism is clear and no development plan is present, provides a good vehicle for the Court to establish a constitutional baseline for government behavior.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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February 20, 2007

APPENDIX

Court of Appeals of New York

In Matter of City of Syracuse Industrial Development Agency, Kaufmann's Carousel, Inc., Carousel Center Company, L.P.; In Matter of City of Syracuse Industrial Development Agency, Lord & Taylor Carousel, Inc., Carousel Center Company, L.P.

NOS. 4, 1119

October 24, 2006

4th Dept.: 32 A.D.3d 1340, 821 N.Y.S.2d 519

Denied.

In re City of Syracuse Indus. Development Agency v. J.C. Penney Corp., Inc. N.Y.A.D. 4 Dept., 2006.
Supreme Court, Appellate Division, Fourth Department, New York.
Matter of the Application of CITY OF SYRACUSE INDUSTRIAL DEVELOPMENT AGENCY, Petitioner-Respondent, to Acquire Certain Interests in the Carousel Center site, which Site is Generally Identified as 1 Carousel Center Drive (Lot 11K). SBL No. 114-02-05.6; 304 Hiawatha Boulevard W. (Lot 11L), SBL No. 114-02-05.7; and 350 Hiawatha Boulevard W. Rear (Lot 1B), SBL No. 114-02-05.2 in the City of Syracuse, New York, which Parcels Comprise a Portion of the Site for the Phased Public Project known as Destiny USA.
v.
J.C. PENNEY CORPORATION, INC., Respondent-Appellant;
Carousel Center Company, L.P., Respondent-Respondent, (Appeal No. 1)
Sept. 29, 2006.

PRESENT: HURLBUTT, J.P., SCUDDER, GORSKI, AND GREEN, J.J.

MEMORANDUM: Petitioner, City of Syracuse Industrial Development Agency (SIDA), commenced these proceedings pursuant to EDPL article 4 by filing a notice of petition and petition with the Onondaga County Clerk's Office on December 29, 2005, seeking condemnation of the "Carousel Center interests" of respondents-appellants (Carousel Center condemnees). Contrary to the contention of the Carousel Center condemnees, Supreme Court properly denied their respective motions and cross motions to dismiss the petitions as time-barred.

EDPL 401(A)(3) provides in pertinent part that "[t]he condemnor [here, SIDA] may commence proceedings under [article 4] to acquire the property necessary for the proposed

public project up to *three years after conclusion of the later of: . . . (3) entry of the final order or judgment on judicial review pursuant to section two hundred seven of this chapter*" (emphasis added). Pursuant to EDPL 207(B), "[t]he jurisdiction of the appellate division of the supreme court *shall be exclusive and its judgment and order shall be final subject to review by the court of appeals in the same manner and form and with the same effect as provided for appeals in a special proceeding.* All such proceedings shall be heard and determined by the appellate division of the supreme court, and by the court of appeals, *as expeditiously as possible and with lawful preference over other matters*" (emphasis added).

Here, the court properly determined that the three-year time period set forth in EDPL 401(A)(3) commenced on February 25, 2003, the date on which the Court of Appeals denied the motion for leave to appeal from our orders of November 15, 2002 confirming the 2002 determination and findings of SIDA to acquire certain property interests and dismissed the appeal of respondent J.C. Penney Corporation, Inc. (*Matter of Kaufmann's Carousel v. City of Syracuse Indus. Dev. Agency*, 301 A.D.2d 292 [2002], *lv denied* 99 N.Y.2d 508 [2003]; *Matter of J.C. Penney Corp. v. City of Syracuse Indus. Dev. Agency*, 301 A.D.2d 305 [2002], *lv dismissed* 99 N.Y.2d 609 [2003]).

The Carousel Center condemnees, with the exception of Bath & Body Works, Inc., doing business as Bath & Body Works, and Borders, Inc., contend that SIDA's acquisition map fails to comply with EDPL 402(B). We reject that contention. As the court properly determined, SIDA specifically identified the interests it seeks to acquire, and those interests are not vague and do not exceed SIDA's 2002 determination and findings. In addition, respondent H & M Hennes & Mauritz, L.P. (H & M) contends that it was not properly served with the petition, including a copy of the acquisition map. We conclude on the record before us that H

& M failed to raise an issue whether it was served with proper notice through the Secretary of State.

Respondents Kaufmann's Carousel, Inc. (Kaufmann's) and Lord & Taylor Carousel, Inc. (Lord & Taylor) contend that the condemnation is improper because the City of Syracuse may be unable to undertake the Carousel project, for which the condemnation is sought. Contrary to the contention of those respondents, however, the fact that a project may not ultimately come to fruition does not negate the power of eminent domain. Rather, "[p]ursuant to the established rule, as long as the initial taking was in good faith, there appears to be little limitation on the condemnor's right to put the property to an alternate use upon the discontinuation of the original planned public purpose" (*Vitucci v. New York City School Constr. Auth.*, 289 A.D.2d 479, 480 [2001], *lv denied* 98 N.Y.2d 609 [2002]).

Finally, Kaufmann's and Lord & Taylor contend that the court improvidently exercised its discretion in setting the undertaking pursuant to EDPL 402(B)(3)(f) because, in their view, the amount set was too low to afford them an appropriate level of protection. We reject that contention. Generally, "[t]he fixing of the amount of an undertaking is a matter within the sound discretion of the [court], and its determination will not be disturbed absent an improvident exercise of that discretion" (*Ujueta v. Euro-Quest Corp.*, 29 A.D.3d 895, 896 [2006]; *see also MonsterHut, Inc. v. PaeTec Communications*, 294 A.D.2d 945, 946 [2002]). "In determining the amount of [the] bond, [the court] will take into consideration the appraisals submitted by all of the parties" (*Mobil Oil Corp. v. City of Syracuse Indus. Dev. Agency*, 224 A.D.2d 15, 20 [1996], *appeal dismissed* 89 N.Y.2d 860 [1996], *lv denied* 89 N.Y.2d 811 [1997]). Here, the court conducted a hearing and set the undertaking at a level between the undertaking values suggested by each party, and we note that neither Kaufmann's nor Lord & Taylor submitted a full appraisal of its respective leaseholds.

Under the circumstances, the court acted within its sound discretion in determining the amount of the undertaking.

All concur except Hurlbutt, J.P., who dissents and votes to reverse in accordance with the following Memorandum.

I respectfully dissent. In my view, the subject EDPL article 4 proceedings must be dismissed as untimely because they were not commenced within three years' "after conclusion of . . . entry of the final order or judgment on judicial review pursuant to [EDPL 207]" (EDPL 401[A][3]). I disagree with the majority's conclusion that the proceedings were timely because they were commenced within three years of February 25, 2003, the date on which the Court of Appeals denied the motion for leave to appeal of respondents Kaufmann's Carousel, Inc. and Lord & Taylor Carousel, Inc. and dismissed the appeal taken by respondent J.C. Penney Corporation, Inc. (*Matter of Kaufmann's Carousel v. City of Syracuse Indus. Dev. Agency*, 301 A.D.2d 292 [2002], *lv denied* 99 N.Y.2d 508 [2003]; *Matter of J.C. Penney Corp. v. City of Syracuse Indus. Dev. Agency*, 301 A.D.2d 305 [2002], *lv dismissed* 99 N.Y.2d 609 [2003]). The proceedings were commenced more than three years after the November 15, 2002 orders of this Court confirming each of the condemnations challenged therein under EDPL 207 (*see Kaufmann's Carousel*, 301 A.D.2d 292 [2002]). I conclude that this Court's order with respect to each proceeding, and not the orders of the Court of Appeals dismissing one appeal and denying the motion for leave to appeal with respect to the other appeal, constitutes the "final order . . . on judicial review pursuant to [EDPL 207]" (EDPL 401[A][3]). That conclusion is compelled by the plain language of the statute, inasmuch as neither the dismissal of an appeal nor the denial of a motion for leave to appeal constitutes "judicial review" within the meaning of EDPL 401(A)(3). Rather, by its orders, the Court of Appeals refused to review the orders of this Court and thus did not adjudicate the merits of the attempted appeals (*see Rupert v. Rupert*, 97 N.Y.2d 661, 663 [2001], *rearg denied* 97 N.Y.2d

726 [2002]; *Matter of Conservative Party of State of N.Y. v. New York State Bd. of Elections*, 88 N.Y.2d 998 [1996]; *see generally Da Silva v. Musso*, 76 N.Y.2d 436, 440 [1990]). I note in addition that Black's Law Dictionary defines the term judicial review as, inter alia, "[a] court's review of a lower court's or an administrative body's factual or legal findings" (Black's Law Dictionary 864 [8th ed 2004]), and it defines the term appellate review as "[e]xamination of a lower court's decision by a higher court, which can affirm, reverse, or modify the decision" (*id.* at 1345).

I also agree with respondents-appellants that, because the precise leasehold rights to be taken are not now ascertainable "with reasonable certainty," the description provided by petitioner, City of Syracuse Industrial Development Agency, of the interests to be taken is impermissibly vague (*Northwest Quadrant Pure Waters Dist. No. 1 v. Payne Beach Assoc.*, 38 A.D.2d 668, 668 [1971]; *see generally Kravec v. State of New York*, 40 N.Y.2d 1060, 1061 [1976]; *Wolfe v. State of New York*, 22 N.Y.2d 292, 295-296 [1968]; *Bell Tel. Co. of Buffalo v. Parker*, 187 NY 299, 303 [1907]; *Town of Webb v. Sisters Realty N. Corp.*, 168 A.D.2d 896 [1990]).

I therefore would reverse the orders, grant the respective motions and cross motions of respondents-appellants and dismiss the petitions.

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

1154.1
CA 06-01472

PRESENT: HURLBUTT, J.P., SCUDDER, GORSKI, AND GREEN, JJ.

MATTER OF THE APPLICATION OF CITY OF SYRACUSE INDUSTRIAL DEVELOPMENT AGENCY, PETITIONER-RESPONDENT, TO ACQUIRE CERTAIN INTERESTS IN THE CAROUSEL CENTER SITE, WHICH SITE IS GENERALLY IDENTIFIED AS 1 CAROUSEL CENTER DRIVE (LOT 11K), SBL NO. 114-02-05.6; 304 HIAWATHA BOULEVARD W. (LOT 11L, SBL NO. 114-02-05.7; AND 350 HIAWATHA BOULEVARD W. REAR (LOT 11B), SBL NO. 114-02-05.2 IN THE CITY OF SYRACUSE, NEW YORK, WHICH PARCELS COMPRISE A PORTION OF THE SITE FOR THE PHASED PUBLIC PROJECT KNOWN AS DESTINY USA.

MEMORANDUM AND ORDER

KAUFMANN' S CAROUSEL, INC., RESPONDENT-APPELLANT;

CAROUSEL CENTER COMPANY, L, P., RESPONDENT - RESPONDENT. (APPEAL NO. 10.)

HARRIS BEACH PLLC, PITTSFORD (DOUGLAS A. FOSS OF COUNSEL), FOR RESPONDENT-APPELLANT.

HISCOCK & BARCLAY, LLP, BUFFALO (MARK R. MC NAMARA OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (John V. Centra, J.), entered May 17, 2006 in a proceeding pursuant to EDPL article 4. The order, among other things, denied the motion of respondent Kaufmann's Carousel, Inc. to dismiss the petition, granted the petition and authorized petitioner to acquire by condemnation certain Carousel Center interests of that respondent.

It is hereby ORDERED that the order so appealed from be and the same hereby is affirmed without costs.

Same Memorandum as in *Matter of City of Syracuse Indus, Dev. Agency* ([appeal No.] ___ AD3d ___ [Sept. 29, 2005])

All concur except HURLBUTT, J.P., who dissents and votes to reverse in accordance with the same dissenting Memorandum as in *Matter of City of Syracuse Indus. Dev. Agency* ([appeal No. 1] ___ A.D.3d ___ [Sept. 29, 2005]).

Entered: September 29, 2006 JOANN M. WAHL
Clerk of the Court

Supreme Court Chambers

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March 16, 2006

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Re: Eminent Domain Proceeding (SIDA – Kaufmann's)
Index No. 05-7106
RJI No. 33-05-4946

Dear Counselors:

Petitioner The City of Syracuse Industrial Development Agency (hereinafter "SIDA") has brought an application before this court pursuant to Article 4 of the Eminent Domain Procedure Law (hereinafter "EDPL") seeking to acquire interests in or associated with land within the existing Carousel Center necessary or appropriate to construct modifications to Carousel Center to create a project known as "DestiNY USA" (hereinafter "Carousel Center Interests") from Kaufmann's, a retail tenant at the Carousel Center, a shopping mall located in Syracuse, New York. Kaufmann's has moved to dismiss this petition on the grounds that (1) the action is untimely; (2) because the action was not timely commenced, the project is deemed abandoned; (3) the public purpose for which SIDA

authorized the taking is no longer feasible; and (4) the interests proposed to be taken are vague, unspecific, and previously not contemplated. Carousel Center Company, L.P. (hereinafter "Carousel") has answered as the equitable owner of Carousel Center and the landlord of Kaufmann's. Carousel has no objection to the petition and waives any right it has to require that SIDA post a bond or other undertaking.

SIDA previously held a public hearing pursuant to Article 2 of the EDPL, and, thereafter, on April 30, 2002, made its Determination and Findings to condemn those Carousel Center Interests. The Determination and Findings were published on May 2 and 3, 2002.

In actions entitled Kaufmann's Carousel. Inc. v. City of Syracuse Indus. Dev. Agency, 301 A.D.2d 292 (4th Dept. 2002), J.C. Penney Corp., Inc. v. City of Syracuse Indus. Dev. Agency, et al., 301 A.D.2d 305 (4th Dept. 2002) and 843 Hiawatha Boulevard, LLC v. City of Syracuse Indus. Dev. Agency, et al., 301 A.D.2d 305 (4th Dept. 2002), the Appellate Division, Fourth Department, confirmed the Determination and Findings of the Article 2 proceeding and concluded that SIDA had complied with the procedural and substantive requirements of the EDPL and other applicable laws by decisions dated November 15, 2002. Thereafter, on February 25, 2003, the Court of Appeals dismissed an appeal as of right in the action entitled J.C. Penney Corp., Inc. v. City of Syracuse Indus, Dev. Agency, et al., 99 N.Y.2d 508 (2003) and denied a motion for leave to appeal in the action entitled Kaufmann's Carousel, Inc. v. City of Syracuse Indus. Dev. Agency, 99 N.Y.2d 609 (2003).

Untimeliness:

This petition was commenced by filing a Notice of Petition and Petition with the Onondaga County Clerk on December 29, 2005. Pursuant to EDPL §401(A), an Article

4 petition may be commenced up to three years after the conclusion of the later of (1) publication of the condemnor's Determination and Findings pursuant to EDPL §204, or (2) the date of the order or completion of the procedure that constitutes the basis of exemption under EDPL §206, or (3) the entry of the final order or judgment on judicial review pursuant to EDPL §207.

At issue here is whether this petition was filed timely pursuant to EDPL §401(A) (3)[1]. SIDA published its Determination and Findings on April 30, 2002. The Appellate Division, Fourth Department, confirmed the Determination and Findings of the Article 2 proceeding on November 15, 2002. The Court of Appeals dismissed an appeal as of right in the J.C. Penney case and denied a motion for leave to appeal in the Kaufmann's Carousel case on February 25, 2003.

Kaufmann's argues that the three year statute of limitations runs from the date of entry of the Appellate Division decision because that is the "final order or judgment on judicial review". Therefore, according to Kaufmann's, in order for this petition to be timely, SIDA had to have filed its Article 4 petition by November 15, 2005, three years after the date that the Appellate Division decision was entered. Because this proceeding was not commenced by that date, Kaufmann's contends that it is untimely and must be dismissed.

SIDA disagrees and states that EDPL §207 provides that "[t]he jurisdiction of the appellate division of the supreme court shall be exclusive and its judgment and order shall be final subject to review by the court of appeals . . . . " Thus, according to SIDA, in order for this petition to be timely,

---

[1] Neither party disputes that this action was not timely filed pursuant to EDPL §401(A)(1) and that EDPL §401(A)(2) is inapplicable to the facts at bar.

SIDA had to have filed its Article 4 petition by February 25, 2006, three years after the date that the Court of Appeals dismissed and/or declined to hear the cases relating to this proceeding.

Section 401(A)(3) provides for a three year period within which to institute acquisition proceedings commencing after a final order or judgment on judicial review and refers to EDPL §207. Section 207 provides that the final order or judgment is subject to review by the Court of Appeals. Because EDPL §207 permits judicial review by the Court of Appeals, this Court finds that the time within which SIDA can commence Article 4 proceedings does not start to run until such time as any such review is terminated. In this case, the three year period commenced on February 25, 2003, the date on which the Court of Appeals dismissed or declined to hear the actions. Because this proceeding was commenced on December 29, 2005, it was within the three year statute of limitations. Accordingly, the court finds that this petition was timely commenced and denies the motion brought by Kaufmann's to dismiss on this ground.

Abandonment:

Kaufmann's argues that because the action is untimely, the court should determine that the project is deemed abandoned. This court, however, has determined that the action is timely, and, thus, denies the motion brought by Kaufmann's to dismiss on this ground.

Public purpose feasibility:

Kaufmann's argues that recent events render development of DestiNY USA impossible. An action was commenced by Carousel against the City of Syracuse alleging that the Mayor refused to perform certain duties enjoined upon him which refusal has prevented and will continue to prevent the

development of DestiNY USA. Kaufmann's contends that because the court has yet to rule on Carousel's action, this court will not be in a position to find, as required by EDPL §402(B)(5), that the procedural requirement of a current public purpose has been established.

This court has recently issued a decision in the Carousel action against the City of Syracuse. Accordingly, this court finds that the procedural requirement of a current public purpose has been established.

Lack of specificity:

SIDA has stated that the following Kaufmann's Carousel Center Interests are to be acquired in this proceeding:

1. Any rights to approve, consent to or otherwise restrict, control or impede in any way the exterior or interior design or layout of that portion of Carousel Center located outside the Kaufmann's store. See, e.g., Kaufmann's Lease: 'Introduction', paragraphs d and last paragraph (unlettered); Joint Improvement Agreement: §2.1(c)-(k), §3.1(a), §4.1(b), §4.2, §4.3, §5.2, §5.8; Allocable Share Agreement: §2.1(a), §2.2, §3.6(d), §3.6(e); Construction, Operation and Reciprocal Easement Agreement: §1.23, §3.4, §8.2, §8.3, §12.1(a)(7), §12.1(a)(11), §14.3, §14.7, §14.8, Exhibit D, Exhibit F;

2. Any rights to approve, consent to or otherwise restrict or control in any way the use or operation, or the location of the use or operation, of any aspect of that portion of Carousel Center located outside the Kaufmann's store. See, e.g., Kaufmann's Lease: Section 2.2 and Article 22; Joint Improvement Agreement: §2.1(c)-(k), §3.1(a), §4.1(b), §4.2, §4.3, §5.2, §5.8; Allocable Share Agreement: §2.1(a), §2.2; Construction, Operation and Reciprocal Easement Agreement: §1.23, §3.4, §3.11, §8.1 §8.2, §11.1,

§11.3, §12.1(a)(7), §12.1(a)(11), §14.1, §14.2, §14.5, §14.6;

3. Any rights to use or occupy any areas outside of the Kaufmann's store. See e.g., Kaufmann's Lease: Sections 1.1, 1.2 and Article 23; Joint Improvement Agreement: §2.1(c)-(k), §3.1(a), §4.1(b), §4.2, §4.3, §5.2, §5.8; Allocable Share Agreement: §2.2; Construction, Operation and Reciprocal Easement Agreement: §3.11, §8.2, §11.3;

4. Any rights which restrict or otherwise adversely affect in any way any contemplated SIDA payment-in-lieu-of-tax ("PILOT") or financing structure for DestiNY USA, including without limitation, any restriction on the amount required to be paid as a PILOT. See, e.g., Kaufmann's Lease: Article 12, Section 13.1 and Section 13.3; Construction, Operation and Reciprocal Easement Agreement: §15.2, §15.3, §25.23;

5. Any other Carousel Center Interests existing or otherwise established in connection with the Kaufmann's store at the existing Carousel Center, including without limitation, any such interests established or otherwise determined by Kaufmann's Carousel, Inc. ("Kaufmann's"), Carousel, SIDA and/or the Court in the Acquisition Order as constituting Kaufmann's Carousel Center Interests to be acquired in this proceeding and not otherwise identified herein. See, e.g., Kaufmann's Lease: Section 2.2, Article 5, Article 6, Article 7, Article 17 and Article 22; Consent, Joinder and Subordination: §1, §3, §5; Construction, Operation and Reciprocal Easement Agreement: §1(d), §1(h), §1.2, §1.8, §1.9, §1.19, §3.1, §11.2, §12.1(a)(2), §12.1(a)(10), §14.4, §14.9, §25.5, §25.14; Non-Disturbance and Attornment Agreement: §1, §5, §6, §12 (all to the extent of the interests in the Kaufmann's Lease that are being acquired).

> Subject to Paragraph 5 above, as shown on Part 1 of the Acquisition Map, SIDA is not acquiring (and does not intend to acquire in this proceeding) any of Kaufmann's or Carousel's rights, or their respective successors' and assigns' rights, to use, occupy, and/or operate the land, building or any other facilities comprising the Kaufmann's store. Notwithstanding any other provision herein, SIDA intends that, as a result of this EDPL proceeding, Kaufmann's and Carousel will continue to have the right to use, occupy, and/or operate the land, building and any other facilities comprising the Kaufmann's store in a landlord/tenant or similar relationship. Also subject to Paragraph 5 above, access to existing or new loading and unloading areas, access to any existing or new common areas, access to any existing or new parking, and existing or new driveways to existing or new neighboring roadways will continue to be provided.

In its papers in response to the motion to dismiss brought by Kaufmann's, SIDA states that it has identified and intends to acquire interests including restrictions that impair or impede the DestiNY USA project (design restrictions, use/operation restrictions, restrictions affecting financing, naming rights, and restrictions on transfer of portions of the Carousel Center). No portion of the Kaufmann's premises is being taken. In addition SIDA states that Kaufmann's will continue to occupy and operate its leased premises without interference.

The Court finds that SIDA has specifically identified the interests it seeks to acquire and that it is neither taking any more than is necessary for the DestiNY USA project nor has it secured a complete taking of all benefits. Further, the court finds that the interests proposed to be taken are not vague or previously not contemplated. Accordingly, the motion brought by Kaufmann's to dismiss the petition on this ground is denied.

The court finds that SIDA has complied with the procedural requirements of the EDPL. SIDA's petition is granted. The requests by Kaufmann's for a stay and for discovery are also denied.

The parties are directed to confer in an attempt to agree upon an amount of the bond. If the parties fail to agree by March 24, 2006, the court will schedule a hearing to determine what the bond should be.

SIDA is to submit, on notice, an Order of Condemnation vesting title to Kaufmann's Carousel Center Interests, as identified in the Petition and Acquisition Map, in SIDA for development of DestiNY USA. The order is to include either an agreed-upon amount for the bond or a decretal paragraph scheduling a hearing as to that issue.

Very truly yours,

John V. Centra
Supreme Court Justice

JVC/dmd

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Re: Eminent Domain Proceeding (SIDA – Lord & Taylor)
Index No. 05-7095
RJI No. 33-05-4955

Dear Counselors:

Petitioner The City of Syracuse Industrial Development Agency (hereinafter "SIDA") has brought an application before this court pursuant to Article 4 of the Eminent Domain Procedure Law (hereinafter "EDPL") seeking to acquire interests in or associated with land within the existing Carousel Center necessary or appropriate to construct modifications to Carousel Center to create a project known as "DestiNY USA" (hereinafter "Carousel Center Interests") from Lord & Taylor, a retail tenant at the Carousel Center, a shopping mall located in Syracuse, New York. Lord & Taylor has moved to dismiss this petition on the grounds that (1) the action is untimely; (2) because the action was not timely commenced, the project is deemed

abandoned; (3) the public purpose for which SIDA authorized the taking is no longer feasible; and (4) the interests proposed to be taken are vague, unspecific, and previously not contemplated. Carousel Center Company, L.P. (hereinafter "Carousel") has answered as the equitable owner of Carousel Center and Lord & Taylor's landlord. Carousel has no objection to the petition and waives any right it has to require that SIDA post a bond or other undertaking.

SIDA previously held a public hearing pursuant to Article 2 of the EDPL, and, thereafter, on April 30, 2002, made its Determination and Findings to condemn those Carousel Center Interests. The Determination and Findings were published on May 2 and 3, 2002.

In actions entitled Kaufmann's Carousel, Inc. v. City of Syracuse Indus. Dev. Agency, 301 A.D.2d 292 (4th Dept. 2002), J.C. Penney Corp., Inc. v. City of Syracuse Indus. Dev. Agency, et al., 301 A. D.2d 305 (4th Dept. 2002) and 843 Hiawatha Boulevard, LLC v. City of Syracuse Indus, Dev. Agency, et al., 301 A.D.2d 305 (4th Dept. 2002), the Appellate Division, Fourth Department, confirmed the Determination and Findings of the Article 2 proceeding and concluded that SIDA had complied with the procedural and substantive requirements of the EDPL and other applicable laws by decisions dated November 15, 2002. Thereafter, on February 25, 2003, the Court of Appeals dismissed an appeal as of right in the action entitled J.C. Penney Corp., Inc. v. City of Syracuse Indus. Dev. Agency, et al., 99 N.Y.2d 508 (2003) and denied a motion for leave to appeal in the action entitled Kaufmann's Carousel Inc. v. City of Syracuse Indus. Dev. Agency, 99 N.Y.2d 609 (2003).

Untimeliness:

This petition was commenced by filing a Notice of Petition and Petition with the Onondaga County Clerk on

December 29, 2005. Pursuant to EDPL §401(A), an Article 4 petition may be commenced up to three years after the conclusion of the later of (1) publication of the condemnor's Determination and Findings pursuant to EDPL §204, or (2) the date of the order or completion of the procedure that constitutes the basis of exemption under EDPL §206, or (3) the entry of the final order or judgment on judicial review pursuant to EDPL §207.

At issue here is whether this petition was filed timely pursuant to EDPL §401(A)(3)[1]. SIDA published its Determination and Findings on April 30, 2002. The Appellate Division, Fourth Department, confirmed the Determination and Findings of the Article 2 proceeding on November 15, 2002. The Court of Appeals dismissed an appeal as of right in the J.C. Penney case and denied a motion for leave to appeal in the Kaufmann's Carousel case on February 25, 2003.

Lord & Taylor argues that the three year statute of limitations runs from the date of entry of the Appellate Division decision because that is the "final order or judgment on judicial review". Therefore, according to Lord & Taylor, in order for this petition to be timely, SIDA had to have filed its Article 4 petition by November 15, 2005, three years after the date that the Appellate Division decision was entered. Because this proceeding was not commenced by that date, Lord & Taylor contends that it is untimely and must be dismissed.

SIDA disagrees and states that EDPL §207 provides that "[t]he jurisdiction of the appellate division of the supreme court shall be exclusive and its judgment and order shall be final subject to review by the court of appeals . . . ." Thus,

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[1] Neither party disputes that this action was not timely filed pursuant to EDPL §401(A)(1) and that EDPL §401(A)(2) is inapplicable to the facts at bar.

according to SIDA, in order for this petition to be timely, SIDA had to have filed its Article 4 petition by February 25, 2006, three years after the date that the Court of Appeals dismissed and/or declined to hear the cases relating to this proceeding.

Section 401(A)(3) provides for a three year period within which to institute acquisition proceedings commencing after a final order or judgment on judicial review and refers to EDPL §207. Section 207 provides that the final order or judgment is subject to review by the Court of Appeals. Because EDPL §207 permits judicial review by the Court of Appeals, this Court finds that the time within which SIDA can commence Article 4 proceedings does not start to run until such time as any such review is terminated. In this case, the three year period commenced on February 25, 2003, the date on which the Court of Appeals dismissed or declined to hear the actions. Because this proceeding was commenced on December 29, 2005, it was within the three year statute of limitations. Accordingly, the court finds that this petition was timely commenced and denies Lord & Taylor's motion to dismiss on this ground.

Abandonment:

Lord & Taylor argues that because the action is untimely, the court should determine that the project is deemed abandoned. This court, however, has determined that the action is timely, and, thus, denies Lord & Taylor's motion to dismiss on this ground.

Public purpose feasibility

Lord & Taylor argues that recent events render development of DestiNY USA impossible. An action was commenced by Carousel against the City of Syracuse alleging that the Mayor refused to perform certain duties

enjoined upon him which refusal has prevented and will continue to prevent the development of DestiNY USA. Lord & Taylor contends that because the court has yet to rule on Carousel's action, this court will not be in a position to find, as required by EDPL §402(B)(5), that the procedural requirement of a current public purpose has been established.

This court has recently issued a decision in the Carousel action against the City of Syracuse. Accordingly, this court finds that the procedural requirement of a current public purpose has been established.

Lack of specificity:

SIDA has stated that the following Lord & Taylor Carousel Center Interests are to be acquired in this proceeding:

1. Any rights to approve, consent to or otherwise restrict, control or impede in any way the exterior or interior design or layout of that portion of Carousel Center located outside the Lord & Taylor store. See, e.g., L&T Lease (as hereinafter defined): 'Introduction', paragraphs d and last paragraph (unlettered); Joint Improvement Agreement: §2.1(c)-(k), §3.1(a), §4.1(b), §4.2, §4.3, §5.2, §5.8; Allocable Share Agreement: §2.1(a), §2.2, §3.6(d), §3.6(e); Construction, Operation and Reciprocal Easement Agreement: §1.23, §3.4, §8.2, §8.3, §12.1(a)(7), §12.1(a)(11), §14.3, §14.7, §14.8, Exhibit D, Exhibit F;

2. Any rights to approve, consent to or otherwise restrict or control in any way the use or operation, or the location of the use or operation, of any aspect of that portion of Carousel Center located outside the Lord & Taylor store. See, e.g., L&T Lease: Section 2.2 and Article 22; Joint Improvement Agreement: §2.1(c)-(k), §3.1(a), §4.1(b), §4.2, §4.3, §5.2, §5.8; Allocable Share Agreement: §2.1(a), §2.2; Construction,

Operation and Reciprocal Easement Agreement: §1.23, §3.4, §3.11, §8.1 §8.2, §11.1, §11.3, §12.1(a)(7), §12.1(a)(11), §14.1, §14.2, §14.5, §14.6;

3. Any rights to use or occupy any areas outside of the Lord & Taylor store. See e.g., L&T Lease: Section 1.1 and Article 23; Joint Improvement Agreement: §2.1(c)-(k), §3.1(a), §4.1(b), §4.2, §4.3, §5.2, §5.8; Allocable Share Agreement: §2.2; Construction, Operation and Reciprocal Easement Agreement: §3.11, §8.2, §11.3;

4. Any rights which restrict or otherwise adversely affect in any way any contemplated SIDA payment-in-lieu-of-tax ("PILOT") or financing structure for DestiNY USA, including without limitation, any restriction on the amount required to be paid as a PILOT. See, e.g., L&T Lease: Article 12, Section 13.1 and Section 13.3; Construction, Operation and Reciprocal Easement Agreement: §15.2, §15.3, §25.23;

5. Any other Carousel Center Interests existing or otherwise established in connection with the Lord & Taylor store at the existing Carousel Center, including without limitation, any such interests established or otherwise determined by Lord & Taylor Carousel, Inc. ("Lord & Taylor"), Carousel, SIDA and/or the Court in the Acquisition Order as constituting L&T Carousel Center Interests to be acquired in this proceeding and not otherwise identified herein. See, e.g., L&T Lease: Section 2.2, Article 5, Article 6, Article 7, Article 17 and Article 22; Consent, Joinder and Subordination: §1, §3, §5; Construction, Operation and Reciprocal Easement Agreement: §1(d), §1(h), §1.2, §1.8, §1.9, §1.19, §3.1, §11.2, §12.1(a)(2), §12.1(a)(10), §14.4, §14.9, §25.5, §25.14; Non-Disturbance and Attornment Agreement; §1, §5, §6, §12 (all to the extent of the interests in the L&T Lease that are being acquired).

> Subject to Paragraph 5 above, as shown on Part 1 of the Acquisition Map, SIDA is not acquiring (and does not intend to acquire in this proceeding) any of Lord & Taylor's or Carousel's rights, or their respective successors' and assigns' rights, to use, occupy, and/or operate the land, building or any other facilities comprising the Lord & Taylor store. Notwithstanding any other provision herein, SIDA intends that, as a result of this EDPL proceeding, Lord & Taylor and Carousel will continue to have the right to use, occupy, and/or operate the land, building and any other facilities comprising the Lord & Taylor store in a landlord/tenant or similar relationship. Also subject to Paragraph 5 above, access to existing or new loading and unloading areas, access to any existing or new common areas, access to any existing or new parking, and existing or new driveways to existing or new neighboring roadways will continue to be provided.

In its papers in response to Lord & Taylor's motion to dismiss, SIDA states that it has identified and intends to acquire interests including a strip of land on the eastern wall of the store, a right to maintain an exterior entrance along that wall, and restrictions that impair or impede the DestiNY USA project (design restrictions, use/operation restrictions, restrictions affecting financing, naming rights). No portion of the Lord & Taylor premises is being taken. In addition SIDA states that Lord & Taylor will continue to occupy and operate its leased premises without interference.

The Court finds that SIDA has specifically identified the interests it seeks to acquire and that it is neither taking any more than is necessary for the DestiNY USA project nor has it secured a complete taking of all benefits. Further, the court finds that the interests proposed to be taken are not vague or previously not contemplated. Accordingly, Lord &

Taylor's motion to dismiss the petition on this ground is denied.

The court finds that SIDA has complied with the procedural requirements of the EDPL. SIDA's petition is granted. Lord & Taylor's request for a stay is denied. Lord & Taylor's request for discovery is also denied.

The parties are directed to confer in an attempt to agree upon an amount of the bond. If the parties fail to agree by March 24, 2006, the court will schedule a hearing to determine what the bond should be.

SIDA is to submit, on notice, an Order of Condemnation vesting title to Lord & Taylor's Carousel Center Interests, as identified in the Petition and Acquisition Map, in SIDA for development of DestiNY USA. The order is to include either an agreed-upon amount for the bond or a decretal paragraph scheduling a hearing as to that issue.

Very truly yours,

John V. Centra
Supreme Court Justice

JVC/dmd

In the Matter of Kaufmann's Carousel, Inc., et al., Petitioners,

v.

City of Syracuse Industrial Development Agency et al., Respondents.

Supreme Court, Appellate Division, Fourth Department, New York

November 15, 2002

APPEARANCES OF COUNSEL

Harris Beach LLP, Pittsford (*David E. Martin* of counsel), for petitioners.

Hiscock Barclay Saperston & Day, Buffalo (*Mark R. McNamara* of counsel), for City of Syracuse Industrial Development Agency, respondent.

Rosenberg & Estis, P.C., New York City (*Gary M. Rosenberg* of counsel), for Carousel Center Company, L.P., respondent.

OPINION OF THE COURT

Pigott, Jr., P.J.

Petitioners Kaufmann's Carousel, Inc. (Kaufmann's) and Lord & Taylor Carousel, Inc. (Lord & Taylor) jointly, and petitioner J.C. Penney Corporation, Inc. (JCPenney) (collectively, Carousel Center petitioners) commenced these original proceedings pursuant to EDPL 207 challenging the findings and determination of respondent City of Syracuse Industrial Development Agency (SIDA) insofar as SIDA authorized condemnation of certain interests that they have as tenants pursuant to leases and other agreements that would restrict the use of land both in and outside of the Carousel Center shopping mall (Carousel Center interests). Each of those petitioners operates a major retail department store in the shopping mall as an anchor tenant. Petitioner 843 Hiawatha Boulevard, LLC (Hiawatha) also commenced an original proceeding pursuant to EDPL 207 challenging the findings and determination of SIDA insofar as SIDA

authorized condemnation of certain real property interests of Hiawatha in order to permit construction of additional roadway and related infrastructure improvements along the Hiawatha Boulevard travel corridor. The stated purpose of the proposed taking is to expand the Carousel Center shopping mall and integrate it with the nearby Carousel Landing shopping mall into a single major shopping center/tourist destination known as "DestiNY USA."

The Carousel Center petitioners contend that SIDA may not exercise its powers of eminent domain to acquire their leasehold and other intangible property rights without also acquiring the underlying real property interests, nor may SIDA curtail its obligations under its proprietary agreements with the Carousel Center petitioners or take property already devoted to a public use. They further contend that SIDA's attempt to alter or abrogate the provisions of their leases and other related agreements violates the Contract Clause of the United States Constitution. The Carousel Center petitioners also attack the validity of the condemnation in various other respects, contending that the determination did not comply with the procedural and substantive requirements of the EDPL and the State Environmental Quality Review Act ([SEQRA] ECL art 8). Hiawatha, on its part, contends that the stated purposes of the proposed condemnation are merely a pretext to acquire Hiawatha's real property in order to construct a golf course.

I

The History Of The DestiNY USA Project

The proposed condemnation of petitioners' property interests is the latest in a series of actions dating back to 1987, when SIDA exercised its powers of eminent domain to acquire approximately 800 acres of land along Onondaga Lake in the City of Syracuse (City) for the purpose of developing a retail shopping mall to be known as Carousel Center. At that time, SIDA entered into a preferred developer agreement with the Pyramid Companies

(Pyramid), a partnership engaged in the development of retail commercial properties. In 1990, Pyramid completed construction of Carousel Center in the northern portion of the lakefront area. In 1990 and 1991, the Carousel Center petitioners entered into long-term lease agreements with Pyramid to operate retail department stores as anchor tenants at Carousel Center.

On October 12, 1995, SIDA issued findings and a determination pursuant to EDPL 204 to acquire by condemnation approximately 55.7 acres of real property owned by various oil companies along the south shore of Onondaga Lake in the "Oil City" area, for the proposed development by Pyramid of another retail shopping mall to be known as Carousel Landing. The oil companies challenged SIDA's determinations in original proceedings pursuant to EDPL 207, and this Court confirmed the determination in each proceeding and dismissed the petitions therein (*Mobil Oil Corp. v City of Syracuse Indus. Dev. Agency,* 224 AD2d 15, *appeal dismissed* 89 NY2d 860, *lv denied* 89 NY2d 811).

In 1997 Pyramid made a proposal to integrate Carousel Landing with Carousel Center and to expand the resulting mall to approximately three times its present size. That plan has come to be known as the DestiNY USA project, which is purported to be one of the largest economic development projects in the history of the State of New York. SIDA initiated procedures under the EDPL to acquire certain property interests for DestiNY USA.

On April 30, 2002, SIDA conducted a public hearing pursuant to EDPL article 2. At the hearing, SIDA's attorney noted that SIDA had determined that the proposed expansion of the Carousel Center constituted a project that would serve public purposes, "including, without limitation, advancing job opportunities, general prosperity and public welfare of the People of the State of New York and the City of Syracuse and . . . advancing economic development and

promoting tourism." He then identified "two general categories" of real property interests sought to be acquired by the condemnation. The first category, which he referred to as "right-of-way interests," are

> "real property interests needed to permit construction, traffic infrastructure improvements, either identified as mitigation measures in connection with the prior . . . [SEQRA] review of the DestiNY USA project, and/or to allow construction of additional roadway and related infrastructure improvements designed to improve pedestrian access between the DestiNY USA project and surrounding areas, as well as to improve the . . . aesthetic conditions along the Bear Street and Hiawatha Boulevard travel corridors in support of the DestiNY USA project."

The second category of real property interests, which SIDA's attorney referred to as the "Carousel Center interests," "may" include:

> "among other things, interests of tenants pursuant to leases or other agreements that may restrict the use of land outside the existing mall building or in the Carousel Center site, i.e., new building areas, parking, landscaping, et cetera, interests which may restrict use of common areas within the Carousel Center mall building, certain leasehold interests within the Carousel Center building which are needed to permit modification of interior areas, interests creating restrictions regarding visibility and signage interests restricting the name of the project, and any other applicable interests."

SIDA then issued its "Determination and Findings Pursuant to EDPL Section 204," dated April 30, 2002, finding that

> "the acquisition of the Right-Of-Way Interests and Carousel Center Interests will help achieve the public purposes, uses and benefits expected to be derived from the DestiNY USA Project, as previously determined by SIDA . . . and will independently help achieve the public

purposes, benefits and uses associated with the potential redevelopment of the Syracuse Lakefront."

SIDA determined that numerous public purposes would be served, including advancing the general prosperity and economic welfare of both the residents of the City and the general population of the State, promoting tourism and attracting visitors from outside the economic development region, ameliorating economic deterioration and promoting employment in the City, and increasing the property tax base as well as sales tax revenues.

II

The Proceedings Commenced In This Court

Thereafter, Kaufmann's and Lord & Taylor commenced an original proceeding pursuant to EDPL 207 challenging SIDA's findings and determination. In their petition, they allege that they own leasehold interests and operate major anchor department stores in Carousel Center. They further allege that, as a necessary inducement to secure their presence in the mall, Pyramid entered into a series of agreements with them "designed to protect both their competitive position and their investment in the mall." Those agreements include leases and other agreements specifying the rights and interests of Kaufmann's and Lord & Taylor in the operation and future development of the Carousel Center. They also entered into a Construction, Operation and Reciprocal Easement Agreement with Pyramid, which granted them special rights in certain common areas, including the parking area immediately surrounding their department stores. In addition, they entered into Allocable Share Agreements and a Joint Improvement Agreement, which granted them additional substantive and collateral rights and interests in the Carousel Center. Those additional substantive and collateral rights and interests include rights and interests with respect to: (1) changes in the layout of Carousel Center, including its design and configuration, and the addition or withdrawal of any property comprising

Carousel Center; (2) the parking and traffic circulation at Carousel Center; (3) the easements in and through Carousel Center, including those for parking, use of the common areas, access and ring roads, utility facilities, and accent and exterior lighting; (4) the design, phasing, and timing of all construction of improvements at Carousel Center; (5) the obligations of the other department stores in Carousel Center, the permitted and prohibited uses of the property, and the leasing of the available retail store space; and (6) the operation and management of Carousel Center under the Carousel Center name. Kaufmann's and Lord & Taylor further allege that they had written agreements with SIDA, including Non-Disturbance and Attornment Agreements, wherein SIDA agreed that it would "not disturb or in any way adversely affect" the rights of Kaufmann's and Lord & Taylor under their respective leases. SIDA also entered into a Consent, Joinder and Subordination Agreement wherein SIDA agreed to subordinate its interest in Carousel Center to the terms, covenants and conditions of the Construction, Operation and Reciprocal Easement Agreement, the Allocable Share Agreements and the Joint Improvement Agreement between Pyramid, Kaufmann's and Lord & Taylor.

Kaufmann's and Lord & Taylor allege that

> "SIDA's proposed taking would leave Kaufmann's and Lord & Taylor with materially different contractual rights than they bargained for as a condition to their decision to enter Carousel Center . . . and could have a deleterious affect [*sic*] on the viability and operation of their stores both during and after the construction of the proposed improvements . . . ."

Kaufmann's and Lord & Taylor challenge SIDA's determination on numerous procedural and substantive grounds.

JCPenney also commenced an original proceeding pursuant to EDPL 207, similarly challenging the findings

and determination of SIDA. In its petition, JCPenney asserts:

> "This special proceeding raises important questions of first impression. Under the guise of condemning real property associated with the Carousel Center Mall located in Syracuse, New York (the 'Mall') (a curious notion since the real property underlying the Mall is already owned in fee by SIDA), SIDA's April 30th Resolution and Determination and Findings authorize the abrogation of various contractual obligations owed by The Pyramid Companies and Carousel Center Company, L.P. (referred to herein collectively as 'Pyramid') to JCPenney. This action by SIDA is intended to, and would if confirmed, relieve Pyramid of its contractual obligation to consult with JCPenney and to obtain JCPenney's consent to any alteration or modification of the Carousel Center Mall. Such an action would be, effectively, a unilateral reformation of JCPenney's contract with Pyramid. The purported condemnation by SIDA is entirely for the private benefit of Pyramid, allowing Pyramid to proceed with modifications to the Mall without consideration of the rights of the current Mall occupants. JCPenney is left without the contractual protections it had carefully negotiated in order to protect its substantial investments in its store located at the Mall."

JCPenney similarly challenges SIDA's determination on various procedural and substantive grounds.

Hiawatha, which owns real property in the area of the proposed expansion, also commenced an original proceeding pursuant to EDPL 207 challenging SIDA's findings and determination. According to Hiawatha, although one alleged purpose of the proposed condemnation was to obtain a right-of-way on Hiawatha Boulevard for purposes of traffic control and other pedestrian improvements in connection with the expansion project, "it appears the proposed taking of [Hiawatha's] property is for the purpose of constructing a

golf course along Hiawatha Boulevard west of the actual project expansion." As an exhibit to its petition, Hiawatha appended a copy of an article from a city newspaper, dated May 15, 2002, headlined "Pyramid launches golf course for Destiny."

Respondents submitted answers in which they, inter alia, denied petitioners' contentions that SIDA is without authority to condemn petitioners' leasehold and real property interests.

III

Petitioners' Challenges Under EDPL 207

Preliminarily, we note that the scope of review of a proposed condemnation is limited by EDPL 207 "to whether the proceeding was constitutional or within the agency's statutory jurisdiction; whether the agency made its determination and findings in accordance with the procedures set forth in [EDPL] article 2; and whether a public use, benefit or purpose will be served by the proposed acquisition . . . . If an adequate basis for a determination is shown and the objector cannot show that the determination was without foundation, the agency's determination should be confirmed" (*Matter of Waldo's, Inc. v Village of Johnson City,* 74 NY2d 718, 720 [internal quotation marks omitted]; *see Sun Co. v City of Syracuse Indus. Dev. Agency,* 209 AD2d 34, 40, *appeal dismissed* 86 NY2d 776).

Initially, JCPenney contends that the so-called Carousel Center interests are not interests in real property, but rather are contract rights, which SIDA has no authority to acquire by eminent domain. Respondents, on the other hand, contend that the Carousel Center interests are leasehold rights, which constitute interests in real property that SIDA may acquire under its power of eminent domain. We agree with respondents.

SIDA's authority to acquire property is derived from General Municipal Law § 858 (4), which provides that a public benefit corporation established as an industrial

development agency under article 18-A of the General Municipal Law may "acquire by purchase, grant, lease, gift, pursuant to the provisions of the eminent domain procedure law . . . real property *or rights or easements therein* necessary for its corporate purposes" (emphasis added; *see Sun Co., Co.*, 209 AD2d at 40). In addition, EDPL 103 (F) defines real property as including "all land and improvements, . . . all easements and hereditaments, corporeal or incorporeal, *and every estate, interest and right, legal or equitable, in lands* or water, and right, interest, privilege, easement and franchise relating to the same, including terms for years and liens by way of mortgage or otherwise" (emphasis added). Those statutes, therefore, are broad enough to encompass an interest in real property such as a leasehold interest. Indeed, the Court of Appeals has stated that "[a] lease is an interest in property which is compensable if the property which is subject to a lease is condemned" *Great Atl. & Pac. Tea Co. v State of New York*, 22 NY2d 75, 84). In addition, courts have upheld the condemnation of leased property in aid of a project of benefit to the public (*see Westchester Cr. Corp. v New York City School Constr. Auth.*, 286 AD2d 154, 161, *affd* 98 NY2d 298; *Gourmet Mgt. v Metropolitan Transp. Auth.*, 163 AD2d 184). Thus, we conclude that the leasehold interests constitute interests in real property that may be acquired by SIDA under its power of eminent domain.

We note, however, that SIDA is not attempting to acquire the entire leasehold interests of the anchor tenants, but rather seeks to acquire only those portions of the leasehold interests that would in some way impair or impede the DestiNY USA project. Those leasehold interests, characterized by JCPenney as mere contract rights, are derived from the lease provision that buildings, improvements and common facilities "shall remain substantially as shown on [an exhibit to the lease] during the term of this lease and that Landlord will not expand any existing building or erect any new building except within the areas shown" and from the lease

provision that the "name of the Shopping Center ... shall not be changed during the term of th[e] lease without Tenant's consent having been first obtained." We conclude with respect to JCPenney's contention that, as long as JCPenney and the other Carousel Center petitioners receive just compensation for the value of the leasehold interests that are to be acquired by condemnation (*see Westchester Cr. Corp.*, 286 AD2d at 162), SIDA may acquire those leasehold interests through the exercise of its power of eminent domain.

The Carousel Center petitioners contend that SIDA may not exercise its powers of eminent domain to acquire rights relating to the Carousel Center interests without also acquiring the underlying real property. We reject that contention. As noted, General Municipal Law § 858 (4) authorizes SIDA to condemn "real property *or* rights or easements therein" (emphasis added). In addition, the Carousel Center petitioners' contention violates the well-established principle that a condemnor has no right to condemn land in excess of what is needed for its public purposes (*see Hallock v State of New York*, 32 NY2d 599, 605). Further, courts in other states have permitted a condemnor to acquire by condemnation leasehold and other contract rights without also acquiring the underlying real property at the same time (*see City of Atlanta v Airways Parking Co.*, 225 Ga 173, 176-177, 167 SE2d 145, 147-148; *City of Glendale v Superor Ct.*, 18 Cal App 4th 1768, 1773-1775, 23 Cal Rptr 2d 305, 308-310. Thus, we conclude that SIDA may acquire the leasehold interests of the Carousel Center petitioners without also acquiring the underlying real property.

There is likewise no merit to the contentions of petitioners that SIDA did not comply with certain procedural requirements of EDPL article 2. EDPL 202 (A) provides in pertinent part:

"Where a public hearing is required by this article the condemnor shall give notice to the public of the purpose, time and location of its hearing setting forth the proposed location of the public project including any proposed alternate locations, at least ten but no more than thirty days prior to such public hearing by causing such notice to be published in at least five successive issues of an official daily newspaper."

EDPL 203 provides in pertinent part:

"At the public hearing the condemnor shall outline the purpose, proposed location or alternate locations of the public project and any other information it considers pertinent, including maps and property descriptions of the property to be acquired and adjacent parcels. Thereafter, any person in attendance shall be given a reasonable opportunity to present an oral or written statement and to submit other documents concerning the proposed public project. A record of the hearing shall be kept, including written statements submitted."

With respect to the ultimate determination and findings of the condemnor, EDPL 204 (B) provides as follows:

"The condemnor, in its determination and findings, shall specify, but shall not be limited to the following:

"(1) the public use, benefit or purpose to be served by the proposed public project;

"(2) the approximate location for the proposed public project and the reasons for the selection of that location;

"(3) the general effect of the proposed project on the environment and residents of the locality; [and]

"(4) such other factors as it considers relevant."

The Court of Appeals has recognized that EDPL 202 (A) and 203 require only that the condemnor set forth the "proposed location of the public project" in the public hearing notice, while "EDPL 204 (B) (2) requires only that the 'approximate location' of the project be specified in the

ensuing determination" (*Matter of Wechsler New York State Dept. of Envtl. Conservation,* 76 NY2d 923, 927, *see also Matter of Town of Riga v County of Monroe,* 166 AD2d 39, 42-43, *appeal dismissed* 78 NY2d 951, *lv denied* 78 NY2d 862). In addition, there is no merit to petitioners' contention that EDPL 202 (A), which requires the condemnor to state the purpose of the hearing in its notice, "obligates it to describe every aspect of the project and its implementation" (*Greenwich Assoc. v Metropolitan Transp. Auth.,* 152 AD2d 216, 220).

Here, SIDA caused a notice of public hearing to be published pursuant to EDPL 202 on five consecutive days, from April 9 through April 13, 2002. The notice stated, inter alia, that SIDA would hold a public hearing on April 30, 2002, at a certain place and time, "for the purpose of describing the acquisition of real property interests (described below); contemporaneously or in stages pursuant to EDPL 401 (C), necessary to construct the DestiNY USA Project, including without limitation acquiring interests in real property necessary to construct public infrastructure improvements and to construct modifications to the existing Carousel Center."

In addition, SIDA's findings and determination state that the real property interests to be acquired consist of the right-of-way interests as well as the Carousel Center interests, which include, inter alia, "interests of some or all tenants in varying degrees created by leases or agreements that may establish restrictions on: the use of the lands surrounding the mall building; the use of space within the mall building that [is] inconsistent with DestiNY USA Project designs; the use of common interior areas within the mall building; visibility and/or signage; the name of the project; and any other applicable interests that may exist." Thus, we conclude that there has been adequate compliance with the procedural requirements of EDPL 202 and 204. We therefore reject the contention of JCPenney that the public hearing notice was inadequate to inform it of SIDA's intention to acquire its

contractual rights and, further, that the findings and determination were so vague as to constitute a deprivation of its right to due process under the Federal and State Constitutions. "[T]he procedures outlined in the EDPL satisfy both the procedural and substantive due process requirements of the Federal and State Constitutions" (*Matter of Waldo's, Inc. v Village of Johnson City*, 141 AD2d 194, 199, *affd* 74 NY2d 718).

JCPenney also contends that the Carousel Center interests are not being acquired for a public purpose, but rather are being "nullified" to the extent that they conflict with the DestiNY USA project in order to benefit Pyramid. Kaufmann's and Lord & Taylor contend that SIDA may not exercise its power of eminent domain to take property already devoted to a public use for a different public use. Hiawatha contends that SIDA is entitled only to the property necessary for its proposed public purpose.

"When reviewing the determination of a municipality to exercise its power of eminent domain, we must determine whether 'a public use, benefit or purpose will be served by the proposed acquisition' (EDPL 207 [C] [4])" (*Matter of Bergen Swamp Preserv. Socy. v Village of Bergen*, 294 AD2d 827, 827-828). The determination must be confirmed if "'the exercise of the eminent domain power is rationally related to a conceivable public purpose'" (*Matter of Jackson v New York State Urban Dev. Corp.*, 67 NY2d 400, 425, *see Bergen Swamp Preserv. Socy.*, 294 AD2d at 828, *see also Matter of Ranauro v Town of Owasco*, 289 AD2d 1089, 1090). Although in addition to the public benefit Pyramid will benefit privately from the project, that "incidental private benefit will not invalidate [the] agency's determination so long as the public purpose is dominant" (*Waldo's, Inc.*, 74 NY2d at 721; *see Sun Co.*, 209 AD2d at 43). Here, SIDA's stated purposes for the acquisition of petitioners' property support the determination that the DestiNY USA project serves a legitimate public purpose,

and that the public purpose is dominant (*see Waldo's, Inc.*, 74 NY2d at 721, *Sun Co.*, 209 AD2d at 43).

Kaufmann's and Lord & Taylor also contend that SIDA lacks authority to condemn their property interests because the power to condemn does not extend to property that is already devoted to a public purpose (*see Buffalo Sewer Auth. v Town of Cheektowaga*, 20 NY2d 47, 52-53). There is no merit to that contention. "[L]and devoted to a public use may be condemned for another public use only if the new use would not materially interfere with the initial use" (*Matter of Village of Middleburgh*, 120 AD2d 830, 831; *see* Town of Riga, 166 AD2d at 41; *see also Bergen Swamp Preserv. Socy.*, 294 AD2d at 828), and here the initial public purpose for the property would be furthered.

JCPenney also contends that SIDA's attempt to alter or abrogate the consent provisions of the lease between JCPenney and Pyramid is an unlawful impairment of contract under United States Constitution, article I, § 10. It is, however, well established that "the exercise of powers that are inherent in and essential to the effective operation of government, such as eminent domain, cannot be contracted away and are not subject to the Contract Clause" (*Westchester Cr. Corp.*, 286 AD2d at 162).

In addition, the Carousel Center petitioners contend that SIDA has failed to meet the substantive and procedural requirements of SEQRA. Specifically, they contend that SIDA has failed to take the required steps to review the potential environmental impact of recent and substantial changes to the DestiNY USA project. Hiawatha advances a similar contention. We conclude that there is no merit to those contentions.

The record establishes that SIDA took the requisite "hard look" at the project and project modifications. It is well established that, "in reviewing the substantive issues raised in a SEQRA proceeding, [a] court will not substitute its judgment for that of the agency if the agency reached its

determination in some reasonable fashion" (*Mobil Oil Corp.*, 224 AD2d at 22; *see Jackson,* 67 NY2d at 416-417). Our authority "is limited to reviewing whether the determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion" (*Matter of Gernatt Asphalt Prods. v Town of Sardinia,* 87 NY2d 668, 688; *see Mobil Oil Corp.*, 224 AD2d at 22). In addition, "[w]hether or not a modification is significant is generally a decision to be made by the agency after taking a 'hard look'" (*Jackson,* 67 NY2d at 429, citing *Sierra Club v United States Army Corps of Engrs.*, 701 F2d 1011, 1036-1037). The extensive record in this case reflects the extent to which this project's potential environmental impacts have been studied as the project has continued to grow.

Finally, Hiawatha does not object to the stated goals of the DestiNY USA project, which it concedes will result in a much needed economic expansion and will help to rejuvenate the economic base of the City. Rather, Hiawatha contends that the stated goals are merely a pretext for one not stated, that of acquiring all of Hiawatha's property in order to construct a golf course. In support of its contention, Hiawatha has appended to its petition a copy of an article from a city newspaper concerning a proposed golf course to be built on the lakefront property.

As SIDA properly notes, the newspaper article is dehors the record and cannot be considered by our Court. Moreover, we cannot rely upon mere conjecture concerning SIDA's alleged "true motivation" as a basis for annulling the determination (*see Matter of Broadway Schenectady Entertainment v County of Schenectady*, 288 AD2d 672, 673).

IV

Conclusion

Accordingly, the determination of SIDA should be confirmed and the petition in each proceeding dismissed.

Hayes, Kehoe, Burns and Lawton, JJ., concur.

It is hereby ordered that the determination be and the same hereby is unanimously confirmed, without costs, and the petition is dismissed.

In the Matter of J.C. Penney Corporation, Inc., Petitioner, v City of Syracuse Industrial Development Agency et al., Respondents. [749 NYS2d 195] -- Original proceeding pursuant to section 207 of the Eminent Domain Procedure Law challenging the findings and determination of respondent City of Syracuse Industrial Development Agency.

It is hereby ordered that the determination be and the same hereby is unanimously confirmed without costs and the petition is dismissed.

Same opinion by Pigott, Jr., P.J., as in *Matter of Kaufmann's Carousel v City of Syracuse Indus. Dev. Agency* (301 AD2d 292). Present--Pigott, Jr., P.J., Hayes, Kehoe, Burns and Lawton, JJ.

In the Matter of 843 Hiawatha Boulevard, LLC, Petitioner, v City of Syracuse Industrial Development Agency, Respondent. [749 NYS2d 196] --Original proceeding pursuant to section 207 of the Eminent Domain Procedure Law challenging the findings and determination of respondent.

It is hereby ordered that the determination be and the same hereby is unanimously confirmed without costs and the petition is dismissed.

Same opinion by Pigott, Jr., P.J., as in *Matter of Kaufmann's Carousel v City of Syracuse Indus. Dev. Agency* (301 AD2d 292). Present--Pigott, Jr., P.J., Hayes, Kehoe, Burns and Lawton, JJ.

FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

U.S. Const. Amend. V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Const. Amend. XIV, Sec. 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

(3)

No. 06-1159

Supreme Court, U.S.
FILED
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IN THE

Supreme Court of the United States

KAUFMANN'S CAROUSEL, INC. and LORD & TAYLOR CAROUSEL, INC.,

Petitioners,

v.

CITY OF SYRACUSE INDUSTRIAL DEVELOPMENT AGENCY and CAROUSEL CENTER COMPANY, L.P.,

Respondents.

On Petition for Writ of Certiorari to the New York Supreme Court, Appellate Division, Fourth Department

BRIEF IN OPPOSITION OF RESPONDENT CITY OF SYRACUSE INDUSTRIAL DEVELOPMENT AGENCY

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Dated: March 29, 2007

CORPORATE DISCLOSURE STATEMENT

The City of Syracuse Industrial Development Agency ("SIDA") is a corporate governmental agency constituting a public benefit corporation of the State of New York. It has no parent corporation and no publicly held corporation holds any stock in SIDA. SIDA does, however, issue bonds, as it has done in connection with the DestiNY USA project at issue in this petition.

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INTRODUCTION

The only question presented by petitioners is whether the taking in this case of certain supposedly "financial provisions" of a lease is for *private* use rather than "public use" and hence barred by the Takings Clause. The petition does *not* present any question whether lease provisions in general, or the specific provisions at issue here, are "property" that may be taken; it does *not* present any question whether the development project is a public use for which property may be taken; and it does *not* present any question regarding the amount of compensation set aside as an undertaking to pay for the property taken. The petition instead only presents the narrow and fact-bound question whether a subset of the property rights had a sufficient nexus to the admitted public purpose of the development project for their taking to satisfy the public-use requirement of the federal Takings Clause.

That limited question was neither presented to, nor decided by, any court below. Indeed, petitioners twice *expressly denied* presenting any constitutional questions to New York's highest court, the Court of Appeals. Although they could have appealed as-of-right had they raised any state or federal constitutional issues, they sought leave to appeal only by permission, and affirmatively denied that they were entitled to an appeal as of right, thus representing to the Court of Appeals that no constitutional issues were involved in this case.

This Court thus lacks jurisdiction because petitioners *failed* to present any federal constitutional question to the State's highest court, as required by 28 U.S.C. § 1257(a), and affirmatively represented to the Court of Appeals that they were *not* raising any such issue. Such a representation below waived any hypothetical federal issue that might have been (but was not) raised earlier in the proceedings and abandoned the prospect of a ruling by the highest state court where review was plainly available. Under such circumstances, this

Court does not have jurisdiction to review an intermediate appellate court decision addressing strictly state-law issues.

Furthermore, even assuming, counter-factually, that the question presented was raised and decided below, this case is wholly unworthy of this Court's time and attention. There is no split, this case is a deeply flawed vehicle, and the question presented is ill-conceived and meritless in any event. In short, there is nothing to recommend this case for certiorari.

JURISDICTION

This Court lacks jurisdiction because the petition does not seek review of a judgment of the "highest court of a State in which a decision could be had," as required by 28 U.S.C. § 1257(a). As explained further in Part I, *infra* at 8-11, review of any federal constitutional issue in this case *could* have been had in the New York Court of Appeals as a matter of right, yet petitioners affirmatively declined to seek such review. The decision of the intermediate appellate court, which was subject to further review on any supposed constitutional issues, thus is not reviewable by this Court.

STATUTORY PROVISIONS INVOLVED

In cases arising from state court, this Court's jurisdiction is defined and limited by 28 U.S.C. § 1257(a), which provides, in relevant part:

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where * * * the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution * * *, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution * * *.

Review in the New York Court of Appeals of any constitutional claim may be had as of right pursuant to N.Y. CIV. PRAC. L. & R. § 5601(b), which provides, in relevant part:

> **(b) Constitutional grounds.** An appeal may be taken to the court of appeals as of right:
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> 1. from an order of the appellate division which finally determines an action where there is directly involved the construction of the constitution of the state or of the United States * * *.

Only in cases where there is no appeal as of right, *i.e.*, no constitutional questions, may review be had in the Court of Appeals pursuant to N.Y. CIV. PRAC. L. & R. § 5602(a), which provides, in relevant part:

> **(a) Permission of appellate division or court of appeals.** An appeal may be taken to the court of appeals * * * by permission of the court of appeals * * *. Such appeal may be taken:
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> 1. * * * (i) from an order of the appellate division which finally determines the action and which is not appealable as of right * * *.

COUNTERSTATEMENT OF THE CASE

1. Respondent SIDA has the statutory purposes "to promote, develop, encourage and assist in the acquiring, constructing, reconstructing, improving, maintaining, equipping and furnishing industrial, manufacturing, warehousing, commercial, research and recreation facilities" for the purposes of advancing "the job opportunities, health, general prosperity and economic welfare of the people of the state of New York and to improve their recreation opportunities, prosperity and standard of living." N.Y. GEN. MUN. LAW § 858. It fulfills its purposes by, *inter alia*, acquiring "real property or rights or easements therein" via eminent domain or otherwise, selling, conveying, or otherwise disposing of such property and

rights in its discretion, borrowing money or issuing bonds, and providing tax incentives. *Id.* §§ 858(4), (12) & (15).

In this case, SIDA was promoting a public benefit well within its statutory purposes by facilitating a development project known as DestiNY USA through use of its eminent domain power and by issuing bonds to finance that project. The various property rights condemned in this case stood as impediments to the development of that project and would have interfered, *inter alia*, with the overall construction, operation, and financing of that project.

2. The DestiNY USA project was an outgrowth and expansion of the earlier SIDA-supported project that created the Carousel Center. After SIDA tentatively determined that the DestiNY USA project had the potential to bring numerous public benefits to the city and the region, and recognizing that the implementation of the project would require the taking of certain property interests, SIDA held a public hearing. Pet. App. 27a. After that hearing, at which public input was invited and received, SIDA issued specific findings that the proposed takings would "help achieve the public purposes, uses and benefits expected to be derived from the DestiNY USA Project." *Id.* at 28a.

3. On June 3, 2002, petitioners brought a so-called Article 2 action in the Appellate Division pursuant to N.Y. EM. DOM. PROC. LAW § 207, to challenge SIDA's findings.[1] Petitioners did not assert a single constitutional claim, but instead

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[1] The scope of review in such a proceeding is limited to whether:

> (1) the proceeding is in conformity with the federal and state constitutions, (2) the proposed acquisition is within the condemnor's statutory jurisdiction or authority, (3) the condemnor's determination and findings were made in accordance with procedures set forth in this article and with article eight of the environmental conservation law, and (4) a public use, benefit or purpose will be served by the proposed acquisition.

N.Y. EM. DOM. PROC. LAW § 207(C).

raised a variety of arguments alleging non-compliance with state-law requirements and supposed limits on SIDA's *statutory* authority. Not once did petitioners assert any claims under the federal or state Constitutions.[2] Furthermore, petitioners acknowledged that the DestiNY USA project would convert the existing mall into "a tourist destination and entertainment venue and include, among other things, an International Tourism/Exposition Center, over 4,000 hotel rooms, a recreational park, an aquarium, and a miscellany of other entertainment, lifestyle, recreation, dining and hospitality attractions." Verified Petition, at 8 (June 3, 2002). They thus conceded that the project involved a "public use." *Id.* at 11 (taking would "permit SIDA to devote its property to a qualitatively different public use [and] would leave [petitioners] with their stores as a portal for a far different public use").

4. On November 15, 2002, the Appellate Division rejected all of petitioners' state-law arguments. Pet. App. 25a-40a. Interpreting SIDA's statutory authority under N.Y. GEN. MUN. LAW § 858(4), the court held that "the leasehold interests [at issue] constitute interests in real property that may be acquired by SIDA under its power of eminent domain." Pet. App. 33a. Addressing several public-purpose arguments raised by the various parties, and analyzing public purpose exclusively as a state-law question under N.Y. EM. DOM. PROC. LAW § 207(C)(4), the court concluded that "SIDA's stated purposes for the acquisition of petitioners' property support the determination that the DestiNY USA project serves a legitimate public purpose, and that the public purpose is dominant." Pet. App. 37a-38a. The court rejected the argument by petitioners that SIDA lacked authority to condemn their interests in "property that is already devoted to a public

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[2] The only references by petitioners to public use involved SIDA's asserted lack of "Statutory Authority and Jurisdiction" to take "land already devoted to a public use for a different public use" or to take property without establishing whether petitioners might *consent* to the proposed plans, rendering a taking unnecessary. Verified Petition, at 14-17.

purpose," finding instead that "here the initial public purpose would be furthered." Pet. App. 38a.[3]

5. On December 18, 2002, petitioners sought leave to appeal to the New York Court of Appeals. Motion for Leave to Appeal (Dec. 18, 2002). Petitioners expressly conceded that the matter was not appealable as of right, thus representing that they were not raising any constitutional issues. N.Y. CIV. PRAC. L. & R. § 5601(b). They instead invoked the discretionary appeal procedure applicable where, at a minimum, no constitutional issues are involved. N.Y. CIV. PRAC. L. & R. § 5602(a).

In their motion for leave to appeal, petitioners specifically averred that:

> (1) the decision and order of the Appellate Division "constitute a final judgment and determined all issues on the merits within the meaning of CPLR §§ 5611 and 5602(a)," Motion for Leave to Appeal, at 3;[4]
>
> (2) the "decision and order is not appealable as of right," *id.*, as would otherwise have been the case had the appeal asserted constitutional issues; and
>
> (3) the Court of Appeals thus had "jurisdiction of the proposed appeal under CPLR § 5602(a)(1)(i)," the permissive appeals provision applicable in cases not raising constitutional issues, *id.*

Consistent with those representations, petitioners presented no federal or state constitutional questions to the Court of

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[3] J.C. Penney, not a petitioner here, also asserted claims under the Due Process and Contracts Clauses, which the court rejected. Pet. App. 38a. Petitioners here neither joined in such claims then nor raise them now.

[4] New York law defines finality as follows: "If the appellate division disposes of all the issues in the action its order shall be considered a final one, and a subsequent appeal may be taken only from that order and not from any judgment or order entered pursuant to it. * * *." N.Y. CIV. PRAC. L. & R. § 5611.

Appeals and accordingly received no review or decision on any constitutional questions from the Court of Appeals.

6. On February 25, 2003, the Court of Appeals denied petitioners' motion for leave to appeal. *See* Pet. App. 11a, 19a.

7. On December 29, 2005, respondent SIDA initiated so-called Article 4 proceedings in the trial division of the New York Supreme Court, pursuant to N.Y. EM. DOM. PROC. LAW § 401, *et seq.*, to condemn the specific property interests of petitioners. Pet. App. 10a, 19a. In those proceedings, petitioners again raised only state-law objections, and asserted no federal or state constitutional claims.

8. On March 16, 2006, the trial court rejected all of petitioners' challenges and approved the condemnations. Pet. App. 12a-16a, 20a-24a. The trial court specifically found that SIDA was not "taking any more than is necessary for the DestiNY USA project." Pet. App. 15a, 23a. Petitioners then appealed to the Appellate Division.

9. On September 29, 2006, the Appellate Division affirmed, Pet. App. 7a-8a, relying upon its contemporaneous decision in the Article 4 condemnation proceeding involving another tenant, J.C. Penney, Pet. App. 2a-6a. Once again, the only claims raised in opposition to the condemnations were based on state law and they were rejected. Pet. App. 3a-5a.[5]

10. On October 4, 2006, petitioners again sought leave to appeal by permission in the Court of Appeals. As they had in 2002, they again represented, *inter alia*, that the "Memoranda and Orders are not appealable as of right," Motion for Leave to Appeal, at 5 (Oct. 4, 2006), as would otherwise have been

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[5] Indeed, the only state-law challenge to public use was based upon the suggestion that the City might "be unable to undertake the Carousel project for which the condemnation is sought," Pet. App. 4a, an argument not renewed before this Court and that is now irrelevant in light of the progression of the project. Similarly, while petitioners at the time disputed the amount of compensation put aside by SIDA as security to pay for the takings at issue, *id.*, they do not pursue that argument in this Court.

the case had the appeal raised any constitutional issues. Again, consistent with that representation, petitioners presented no constitutional questions to the Court of Appeals.[6]

11. On October 24, 2006, the Court of Appeals denied petitioners' motion for leave to appeal. Pet. App. 1a.

This petition for certiorari followed.

REASONS FOR DENYING THE WRIT

Certiorari should be denied because this Court lacks jurisdiction in that the federal constitutional question herein was not presented below, the petition is not from a decision of "the highest court of a State in which a decision could be had," as required by 28 U.S.C. § 1257(a), there is no split, the case is a poor and fact-bound vehicle for addressing the question presented, and the petition is meritless in any event.

I. THIS COURT LACKS JURISDICTION.

Under 28 U.S.C. § 1257(a), this Court has certiorari jurisdiction over cases arising in state court only from "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had" where "any title, right, privilege, or immunity is specially set up or claimed under the Constitution." The petition here fails to satisfy those mandatory jurisdictional prerequisites.

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[6] Petitioners' passing mention, in their Motion for Leave to Appeal, at 15-16, of *Kelo* v. *City of New London*, 545 U.S. 469 (2005), raised no federal claim, but merely described that case as a "high water mark" for the use of eminent domain power and cited the *dissent* in *Kelo* as the impetus for many States to amend their own statutes to provide greater limits than does the federal Constitution. Petitioners' unfavorable comparison of the takings here with those in *Kelo* never argues that the takings here violate the federal Constitution, but rather is an aesthetic point intended to encourage more restrictive *state* jurisprudence, as in the other state examples petitioners cite. Such reference to *Kelo* not only is insufficient to present a federal claim, it seems to concede the lack of a federal claim post-*Kelo*.

First, as the counterstatement of the case amply illustrates, petitioners at no point below "specially set up or claimed" any rights under the Constitution, much less asserted the particular rights they now seek in the question presented.

While petitioners claim that in the 2002 Article 2 action they argued "that no public purpose would be served" by the condemnations here, Pet. 7, that claim is made without citation to the record, does not identify the basis for their allegation of no public purpose, and does not even assert that their argument was based on the federal or state Constitution, as opposed to on narrower statutory grounds.[7] And the only state-law public-purpose argument petitioners appear to have raised in that proceeding was that their property was already devoted to a public purpose and hence could not be taken for a *different* public purpose, Pet. App. 38a, an argument they do not renew in this Court. Petitioners' further contention that they challenged the public purpose of the takings in the 2005 Article 4 proceedings, Pet. 10, refers at most to a dispute over the "necessit[y]" for taking one of the several lease provisions and similarly fails to identify any constitutional basis for their arguments. Such disputes over the proper scope of a taking, or the "necessity" to acquire particular property interests, are state-law questions. *See infra* at 11-12 & n. 11.

Second, aside from their failure *ever* to raise a federal constitutional question, petitioners now seek review from the decision of an *intermediate* appellate court, not from any

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[7] Indeed, this Court in *Kelo* recognized that States may impose and have already imposed "'public-use' requirements that are stricter than the federal baseline," either as a matter of state constitutional law or "state eminent domain statutes that carefully limit the grounds upon which takings may be exercised." 545 U.S. at 489. Precisely because federalism allows for such differing public-use standards, it is essential for parties to *specifically* invoke the federal Constitution if that, rather than state law, is the basis for their claim. A bare discussion of "public use" is insufficient. *Webb* v. *Webb*, 451 U.S. 493, 495-98 (1981) (bare mention of "full faith and credit" insufficient to present federal, rather than state, issue).

judgment of the "highest court" in which a constitutional ruling "could [have been] had," but was never sought.

As set forth in the counterstatement of the case, petitioners could have "had" review and a ruling in the Court of Appeals on any supposed constitutional issues via appeals as of right, in either the Article 2 or Article 4 proceedings. They elected not to seek such appeals, thereby either conceding that no constitutional issues were presented or waiving any such issues as they might have imagined were presented in the lower courts. Indeed, they affirmatively represented to the Court of Appeals, in both of their motions, that an appeal as of right was *not* available, thus admitting that they were not presenting any constitutional issues. Such admissions were effective to preclude further review in the highest court as of right, and are equally effective at negating this Court's jurisdiction. *Parker* v. *Illinois*, 333 U.S. 571, 574-75 (1948).

Assuming that there was ever a constitutional issue presented to the lower courts in this case, petitioners' failure to take an appeal as of right means *there is no decision* on any constitutional issue from the "highest court of a State in which a decision *could be* had."[8] This petition from the decision of the *lower* Appellate Division, which could have been but was not appealed as of right to the Court of Appeals, therefore is outside the scope of this Court's jurisdiction.[9]

Third, even ignoring petitioners' failure to raise *federal* constitutional issues below, any petition to this Court on public-use issues arguably should have been taken from the final

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[8] The denial of motions for leave to appeal that flatly denied presenting any constitutional question of course could not resolve any such question.

[9] *Gotthilf* v. *Sills*, 375 U.S. 79, 80 (1963) (failure to utilize available New York procedure for appeal to the Court of Appeals renders judgment of Appellate Division" non-reviewable); Robert L. Stern, Eugene Gressman, Stephen M. Shapiro & Kenneth S. Geller, SUPREME COURT PRACTICE 115 (7th Ed. 1993) ("Stern & Gressman") ("Where there is a review as of right of intermediate court decisions, of course, such review must be sought.").

judgment in the 2002 Article 2 proceeding. It is that proceeding where constitutional issues should have been raised, N.Y. EM. DOM. PROC. LAW § 207(C), and petitioners themselves have represented that the resolution of that proceeding "constitute[d] a final judgment and determined all issues on the merits." Motion for Leave to Appeal at 3.[10]

II. THERE IS NO SPLIT ON THE QUESTION PRESENTED.

Disregarding the nature of a "conflict" among courts of appeals or highest state courts as referred to in this Court's rules, S. CT. R. 10(b), petitioners assert generic conflict and confusion among courts, often over issues not even presented by the question in their petition.

For example, petitioners assert a conflict between courts that supposedly ignore "any concern about the possibility of self-dealing" and other courts that "have required the government to demonstrate a causal connection between the taking and the alleged public use." Pet. at 22-23.

To begin with, the Appellate Division's brief discussion of the state-law public-use issue correctly observed that the mere presence of some private benefit does preclude a public purpose where the public benefit outweighs the incidental private benefit. Pet. App. 37a-38a. That state-law standard by no means *ignores* concerns over incidental private benefits from a taking, and is entirely consistent with this Court's decision in *Kelo* v. *City of New London*, 545 U.S. 469, 485-87 (2005) (finding public use despite significant private benefit).

Similarly, the court in *HTK Management, L.L.C.* v. *Seattle Popular Monorail Authority* did not ignore concerns over incidental private benefits and addressed a situation where pub-

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[10] Furthermore, petitioners' failure to raise any constitutional issues on appeal from the 2002 Article 2 proceeding seems also to represent a procedural default that constitutes an adequate and independent ground for not considering such issues in subsequent proceedings, even had petitioners later raised such issues, which they did not. Stern & Gressman, at 126.

lic use was "undisputed." 121 P.3d 1166, 1175 (Wash. 2005). Indeed, the portion of *HTK* cited by petitioners addresses the *state*-law requirement of "necessity," without mentioning the federal Constitution or citing a federal case. *Id.* at 1176-77.[11] The only similarity between *HTK* and the decisions below is that none of them address the Fifth Amendment or involve the question presented here.

As for the sole supposedly conflicting appellate case, *Rhode Island Economic Development Corp.* v. *The Parking Co.*, 892 A.2d 87 (R.I. 2006), Pet. 23, the court there rejected the taking of a temporary easement because it deprived the property owner of *all* possession and benefit of its parking garage without even a colorable claim to a public purpose. *Id.* at 105-07. Indeed, the primary asserted purpose for the taking – "increased parking" – was found to be pretextual based on particular facts belying such interest. And, the holding was driven in large part by the agency's failure to disclose in the *ex parte* proceedings below that it had a purchase option for the same property at a pre-agreed price, thus misleading the lower court into setting just compensation far below that agreed purchase price. *Id.* at 104-05. Under such fact-bound circumstances, it is no wonder that the alleged public purpose was deemed a pretext. But such circumstances bear no resemblance to the present case – where the "public" purpose of the DestiNY USA project as a whole is conceded and is in no way pretextual – and demonstrate mere differences in *facts*, not in legal principles, between the two cases.[12]

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[11] *See also Rhode Island Econ. Dev. Corp.* v. *The Parking Co.*, 892 A.2d 87, 96 (R.I. 2006) ("[W]hether a taking constitutes a public use is a judicial question. * * * [I]n contrast to establishing the nature of the use, the necessity and expediency of the taking to further the public use is purely a legislative question in which the courts do not engage.").

[12] *MHC Fin. Ltd. Partnership* v. *City of San Raphael*, No. 00-3785, 2006 WL 3507937, at *14 (N.D. Cal. Dec. 5, 2006), cited by petitioners, at 23, is a district court case not meaningful to any claimed split and held only that there needs to be some evidence of public purpose, and that the City

Petitioners' further assertion, at 23-24, that there is confusion over the *standard* to be applied to claims of private favoritism likewise does not present a "conflict."

As a preliminary matter, none of the cases cited by petitioners are precedential decisions from a federal court of appeals or a highest state court. *Cf.* S. Ct. R. 10(b). *Western Seafood Co.* v. *United States*, 202 Fed. Appx. 670 (CA5 2006) is an unpublished opinion and *Diddien* v. *Village of Port Chester*, 173 F. Appx. 931 (CA2 2006), *cert. denied*, 127 S. Ct. 1127 (2007), is a summary order, neither of which is considered precedent by their respective circuits. *99 Cents Only Stores* v. *Lancaster Redevelopment Agency*, 237 F. Supp.2d 1123 (C.D. Cal. 2001), *appeal dismissed as moot*, 60 F. Appx. 123 (CA9 2003), and *In re Redevelopment Authority of City of Philadelphia*, 891 A.2d 820 (Pa. Commw. Ct.), *appeal granted*, 903 A.2d 539 (Pa. 2006), are both trial court decisions of no precedential significance, with the former having been dismissed as moot and the latter being on appeal to the Pennsylvania Supreme Court.[13]

Furthermore, *Western Seafood* affirmatively *declined* to reach the issue on which petitioners assert a split. 202 F. Appx. at 675. If anything, the case illustrates why the decision to deal with a particular private party for a development project is a fact-bound matter not especially probative of favoritism. *Id.* at 675 & n. 9 (city had ample reasons to deal with a pre-existing party with an obviously compatible interest in the development; source of idea for development was irrelevant to accusations of favoritism). Similarly, *Diddien* was resolved on statute-of-limitations grounds, not on the tak-

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proffered "no such evidence." In this case there is ample evidence of, and petitioners do not dispute, the public benefits of the DestiNY USA project.

[13] The passing citation to *99 Cents* by this Court in *Kelo* is not even remotely the approval suggested by petitioners, Pet. 24, but merely an observation attached to this Court's statement that bare one-to-one transfers were "not presented in this case," and that it was *not* going to address such hypotheticals until "they arise." *Kelo*, 545 U.S. at 487 & n. 17.

ings issue, mentions private use only in *dicta*, and even then quotes this Court's decision in *Kelo* for the proposition that "'[j]ust as we decline to second-guess the City's considered judgments about the efficacy of its development plan, we also decline to second-guess the City's determinations as to what lands it needs to acquire in order to effectuate the project.'" 173 F. Appx. at 933 (quoting 545 U.S. at 488-89).[14] Thus, not only do such cases not *conflict* with the decisions below here, their *dicta* actually would support the result below if a constitutional claim actually *had* been raised.

Lastly, petitioners suggest a generic conflict of some sort on the need for a "reasoned justification" for takings. Pet. 24-25. Such generic conflicts, of course, are the last resort of litigants who cannot find an *actual* split and, in any event, the cases cited do not support any conflict.

Petitioners' reliance on *Daniels* v. *Area Plan Commission*, 306 F.3d 445 (CA7 2002), is wildly misplaced. The Seventh Circuit only refused to apply the ordinary substantial deference to a stated public purpose because the Commission in that case lacked specific statutory authority to take property and had no *legislatively* set purposes against which to measure its actions. *Id.* at 460-61, 464. Indeed, Indiana law, unlike New York law, precluded the Commission from taking property for "economic development" and determined that such development "does not constitute a public purpose sufficient to satisfy the public use requirement * * * under Indiana

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[14] Even the case on which petitioners primarily rely, *Rhode Island Economic Development Corp.*, applies the lenient standard that petitioners eschew. *See* 892 A.2d at 101 ("'[W]here the legislature declares a particular use or purpose to be a "public use" such a declaration will control unless the use or purpose in question is obviously of a private character.'") (citation omitted); *id.* at 103 ("[I]t is not for this Court to question whether a taking authorized by the General Assembly will accomplish its intended goals because the constitution is satisfied if the Legislature '*rationally could have believed* that the enactment would promote its objective.'") (citation omitted; emphasis in original).

law." *Id.* at 463. Here, of course, the New York legislature has expressly defined the public purposes for which SIDA may condemn property, N.Y. GEN. MUN. LAW § 858, the taking is based precisely on such purposes, and even the Seventh Circuit would give SIDA's determination of public purpose the substantial deference it withheld in *Daniels*.

Petitioners' citation to *South West Illinois Development Authority* v. *National City Environmental, L.L.C.*, 768 N.E.2d 1 (Ill.) ("*SWIDA*"), *cert. denied*, 537 U.S. 880 (2002), Pet. 25, is similarly misleading. In *SWIDA*, the Illinois Supreme Court based its holding on the supposedly "essential" notion that "public use" is somehow different and narrower than a "public purpose." 768 N.E.2d at 8, 9. That notion and the added scrutiny imposed in *SWIDA*, if they were ever good law at all, are now plainly rejected as expressions of *federal* constitutional law. *See Kelo*, 545 U.S. at 479-480 (public use coextensive with public purpose); *id.* at 480 (noting "long-standing policy of deference to legislative judgments" of public purpose); *id.* at 488-89 (refusing to "second-guess" determinations about "the amount and character" of property needed to further a public purpose). Furthermore, aside from being superseded by *Kelo*, *SWIDA* dealt with a transfer of property that was far more clearly designed to benefit an individual business rather than the public, whereas this case involves an extensive development project with public benefits easily equaling or exceeding those proffered in *Kelo* itself.[15]

In sum, the notion that there is a split, a conflict, or anything else that would warrant this Court's present attention is, at best, wishful thinking.

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[15] The other two cases cited by petitioners, Pet. 25, are similarly irrelevant. *MHC Financial*, 2006 WL 3507937, at *14, is, again, a district court case that does not conflict with the decisions below. *See supra* at 12-13 n. 12. And this Court's decision in *City of Cincinnati* v. *Vester*, was decided on state-law grounds, specifically "refrain[ed] from expressing an opinion" on the constitutional questions argued, and thus does not even remotely conflict with the present case. 281 U.S. 439, 449 (1930).

III. THIS CASE IS A POOR VEHICLE FOR ADDRESSING THE QUESTION PRESENTED.

Even were this Court to assume that federal issues were presented, *sub silentio*, at some undefined point below, this case would still be an exceedingly poor vehicle for addressing the question presented in the petition.

First, the decisions below do not *discuss* or *decide* any federal questions, much less the question presented, and thus provide this Court no baseline for its own analysis of this case. This Court thus would find itself in the awkward position of "reviewing" a hypothetical decision, based on hypothetical reasoning, and then being asked to criticize the courts below for not providing a different (indeed, any) answer to a question they were never asked to address. That not only would burden this Court, it would deny the state courts the respect they are due as independent interpreters of the federal Constitution in the first instance, subject to *review*, but not disregard, by this Court. Stern & Gressman, at 117.

Second, this case is exceedingly fact-bound. The operation of the lease provisions in question are not shown to be typical, their interaction with the development project is quite situation specific, and petitioners' charges of favoritism turn on numerous facts surrounding the ample reasons for sticking with the developer from the original Carousel Center project. Furthermore, because the question presented here was not litigated below, those facts and others are largely absent from the record, giving this Court no foundation for evaluating petitioners' now-asserted lack of necessity for taking the so-called "financial" provisions of the leases or whether such provisions stood as an impediment to the development project. Petitioners cite no record evidence in support of such distinctly factual claims. Pet. 10, 12, 18.[16]

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[16] Petitioners' erroneous assertion that SIDA was "goaded" into the takings at issue in this case, Pet. 6, though of uncertain relevance, is similarly

Third, because the Court of Appeals has never opined on the rulings of the Appellate Division in this case, the petition here is premature in that any (hypothetical) rulings of law regarding the Takings Clause are not even a final description of the law in New York State, and hence could easily be altered when a party finally presents such issues to the Court of Appeals. It is presumptuous for petitioners to ask *this* Court to expend its limited time and resources on this case when petitioners did not bother even *informing* the Court of Appeals of the issues they now raise.

Fourth, the mere presence of jurisdictional problems here at a minimum would divert time and attention from the merits and makes this case a poor vehicle. Even assuming the hypothetical possibility that petitioners could overcome the plain jurisdictional defects here, it would be preferable for this Court to await a less problematic vehicle.[17]

Fifth, given petitioners' own characterization of this case as the supposedly novel "herald[]" of a "'new era in condemnation strategy,'" Pet. 2, 13, this Court has ample reason to avoid swimming in unknown waters and should allow any issues supposedly raised by this case to percolate. Indeed, if

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fact-bound and lacking in record support. The bare and meaningless opinions of a commentator on leases hardly compensate for petitioners' failure to make their record below.

[17] Another problem here is petitioner Lord & Taylor Carousel, Inc.'s recent disclosure that it has not, since October 2, 2006, had any interest in the current dispute, which raises considerable doubt whether the petition is effective regarding the former Lord & Taylor interests. *See* Letter from Daniel J. Moore to William K. Suter, March 21, 2007 (on file with the Court). When the petition was filed, the named petitioner seems to have lacked any legal interest, and hence standing, to file the petition. There is likewise no suggestion that Lord & Taylor was authorized to act on behalf of the new owner of such interests, LT Propco, LLC, which did not itself timely seek certiorari. It seems at least highly debatable whether the new owner now simply can adopt the petition filed by the then-legally-disinterested Lord & Taylor. Whatever the proper resolution of that issue, it injects further difficulty and distraction into an already doubtful vehicle.

petitioners are correct in their predictions of a "new era" of similar takings cases, then one can certainly expect sufficient future opportunities to review any issues if and when a split arises and a case properly presents such issues.

IV. THE PETITION IS WITHOUT MERIT IN ANY EVENT.

The narrow question presented in the petition – whether the taking of so-called "financial" lease rights fails to serve a public use – has no merit and bears little relationship to many of the arguments raised in the petition.

First, the petition's extended discussion of vested rights and retroactive abrogation of rights, Pet. 14-17, has *nothing* to do with the question presented given that all takings, by definition, retroactively take or void vested rights. Saying that a right is *vested* is no more than saying that it is a *property* right, which is not in dispute before this Court. Indeed, that is why petitioners are receiving compensation at all. Similarly, saying that their rights were retroactively voided – aside from being inaccurate as only the prospective operation of the lease provisions was affected – says nothing more than that they were "taken."

And, while petitioners hand-wring over the fact that the takings here involved only "selected contract rights" in leases appurtenant to real property, Pet. 2, 10, they ignore that such rights are indeed "property" under New York law, Pet. App. 33a, they ignore that government plainly may take only some of the twigs in the bundle of rights that is property, Pet. App. 34a, the question presented does not challenge the categorization of such lease provisions as "property," Pet. i, and, if petitioners *did* dispute the categorization of such lease rights as property, they simply would be denying the very *applicability* of the Takings Clause at all.

Likewise, petitioners' citation to cases regarding the unequal imposition of the burden of public activities, Pet. 16, is both misleading and irrelevant in the context of a takings case where petitioners do not challenge in this Court the undertak-

ing for just compensation set by the courts below. Indeed, arguments regarding spreading the cost of government action are the very reason why compensation is provided in such instances, as it is being provided here. Petitioners' suggestion, therefore, that they are unfairly being forced to bear more of the cost or risk associated with the development project, Pet. 18-19, entirely ignores that they are being *compensated* for the takings.[18] To the extent they claim that the lease provisions at issue insulated them from greater costs and risks, that is an argument going to the *amount* of compensation, which they do not challenge here, not to the legitimacy of the public purpose in taking those provisions.

Second, petitioners' claim, at 11, 18-21, that takings to decrease the *cost* of a public-purpose development project inure only to the private benefit of a developer, is badly misconceived. It is SIDA, after all, that is financing the project by issuing bonds, and removing impediments that would hinder or increase the expense of such financing plainly benefits SIDA and the development project as a whole, thus furthering the public purpose of that project. So long as the public, through SIDA, pays compensation for the removal of such impediments, the Takings Clause is satisfied and the benefits of lower-cost financing properly inure to the public.

Furthermore, the very point of development assistance provided by entities such as SIDA, whether through tax incentives, subsidies, infrastructure improvements, or takings, is to reduce the *cost* of development and thereby encourage such publicly beneficial projects. Petitioners' arguments characterizing cost-reduction as a purely private benefit thus would

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[18] Such unchallenged compensation renders the taking an economic wash, and does not impose any net costs on, or take wealth from, petitioners. *See Kelo*, 545 U.S. at 487 n. 19 ("A parade of horribles is especially unpersuasive in this context, since the Takings Clause largely 'operates as a conditional limitation, permitting the government to do what it wants so long as it pays the charge.'") (citation omitted).

indict all development assistance as lacking a public purpose, a position squarely rejected by this Court in *Kelo*. 545 U.S. at 484-86 (rejecting proposed "rule that economic development does not qualify as a public use" notwithstanding the fact that "government's pursuit of a public purpose will often benefit individual private parties"); *id.* at 481-82 (recognizing "'monetary'" and "cost" components to promoting public welfare) (citation omitted).

Third, petitioners' attempt, at 17-18, to apply its public-use analysis at the retail level – to individual takings or to mere subsets of the property taken – confuses the federal question of public use with the state question of the necessity and scope of a particular taking. *See supra*, at 11-12 & n. 11. Once again, *Kelo* expressly rejected such a particularization of the public-use inquiry. 545 U.S. at 481 (rejecting "'piecemeal'" analysis of a taking) (citation omitted); *id.* at 484 (Court should "resolve the challenges of the individual owners, not on a piecemeal basis, but rather in light of the entire plan * * * [which] unquestionably serves a public purpose").

In the end, petitioners merely seek to revisit and relitigate issues that have already been recently resolved by this Court in *Kelo*, and cite numerous irrelevant and inapplicable cases to create the illusion, but not the reality, of a problem where none exists. Their property interests have been taken in the service of a large development project having a plainly public purpose and petitioners are being justly compensated for those takings. The scope and necessity of the takings here, as opposed to the public purpose of the project as a whole, are not judicial questions and thus the petition lacks merit.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

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Dated: March 29, 2007

No. 06-1159

IN THE

Supreme Court of the United States

KAUFMAN'S CAROUSEL, INC., AND
LORD & TAYLOR CAROUSEL, INC.,

Petitioners,

v.

CITY OF SYRACUSE INDUSTRIAL DEVELOPMENT AGENCY
AND CAROUSEL CENTER COMPANY, L.P.,

Respondents.

On Petition for Writ of Certiorari to the New York Supreme Court, Appellate Division, Fourth Department

BRIEF IN OPPOSITION OF RESPONDENT CAROUSEL CENTER COMPANY, L.P.

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, respondent Carousel Center Company, L.P. states that it is a limited partnership organized under New York law. The general partner is Carousel General Company, LLC, and the limited partner is Carousel Enterprises Company, LLC. No publicly held corporation owns 10% or more of the stock of either partner.

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INTRODUCTION

The petition purports to present a question involving the "public use" provision of the Takings Clause of the Fifth Amendment to the United States Constitution. *See* Pet. i. But this case does not actually present that question. Petitioner never raised that federal constitutional question in the state court proceedings below, and the state courts below accordingly did not address that question. Indeed, the "public use" dispute between these parties was resolved in an earlier proceeding (a so-called "Article 2" proceeding under New York eminent domain law), and even then petitioners raised only state-law (not federal) arguments. This separate proceeding (a so-called "Article 4" proceeding filed almost three years after the conclusion of the Article 2 proceeding) involves only the *scope* of the condemnation. Accordingly, the petition is entirely contrived. Needless to say, this Court is not in the business of deciding federal constitutional questions that were neither presented to nor decided by the state courts below.

In any event, the petition does not warrant review on the merits. Given that the courts below were not asked to decide, and did not decide, any issue of federal constitutional law, petitioners obviously cannot and do not allege that the decision below created or deepened a conflict on an issue of federal constitutional law. Essentially, petitioners do not like this Court's decision just two years ago in *Kelo v. City of New London*, 545 U.S. 469 (2005). But petitioners provide no reason for this Court to revisit *Kelo* so soon, least of all in a case in which no *Kelo* issue was raised or decided below.

COUNTERSTATEMENT OF THE CASE

This case involves "one of the largest economic development projects in the history of the State of New York," Pet. App. 27a: the plan by respondent Syracuse Industrial Development Agency (SIDA) to create a major shopping and tourism destination, DestiNY USA, on a

brownfield site in Syracuse. An important component of that project is the expansion and redevelopment of an existing shopping center, the Carousel Center. Respondent Carousel Center Company, L.P. owns that shopping center; petitioners Kaufman's Carousel, Inc., and Lord & Taylor Carousel, Inc. are tenants.

A. The Article 2 Proceeding

In order for the project to succeed, SIDA determined that it would need to acquire two general categories of property interests: (1) "right-of-way interests" (*i.e.*, property that would allow access to the project site), and (2) "Carousel Center interests" (*i.e.*, property interests of Carousel Center tenants that conflicted with the project). Pet. App. 28a. Under New York's Eminent Domain Procedure Law (EDPL), SIDA could not acquire these property interests without first determining that "a public use, benefit or purpose will be served by the proposed acquisition." N.Y. Em. Dom. Proc. Law § 207(c)(4).

After a public hearing, SIDA issued the requisite determination and findings in April 2002. Pet. App. 28-29a. Among other things, SIDA concluded that "the acquisition of the Right-Of-Way Interests and the Carousel Center Interests will help achieve the public purposes, uses and benefits expected to be derived from the DestiNY USA Project, as previously determined by SIDA ... and will independently help achieve the purposes, benefits and uses associated with the potential redevelopment of the Syracuse Lakefront." *Id.; see also id.* at 29a ("SIDA determined that numerous public purposes would be served, including advancing the general prosperity and economic welfare of both the residents of the City and the general population of the State, promoting tourism and attracting visitors from outside the economic development region, ameliorating economic deterioration and promoting employment in the City, and increasing the property tax base as well as sales tax revenues.").

Petitioners thereafter filed an original proceeding under EDPL Article 2 in the intermediate state appellate court, challenging SIDA's "public use" findings. Pet. App. 28-29a. In that proceeding, however, petitioners argued only that the proposed taking violated SIDA's authority under the EDPL; they raised no argument under the Takings Clause of the federal constitution.

A unanimous five-judge panel rejected petitioners' various challenges to SIDA's findings. Pet. App. 25-40a. Among other things, the appellate court explained that SIDA's determination that the proposed taking would serve a public use within the meaning of the EDPL "must be confirmed if the exercise of the eminent domain power is rationally related to a conceivable public purpose." Pet. App. 37a (internal quotations omitted). That test, the court held, was easily satisfied: "SIDA's stated purposes for the acquisition of petitioners' property support the determination that the DestiNY USA project serves a legitimate public purpose, and that the public purpose is dominant." Pet. App. 37-38a. Thus, it is immaterial whether the project would also benefit other private parties. Pet. App. 37a ("[An] incidental private benefit will not invalidate an agency's determination so long as the public purpose is dominant.") (brackets modified). Petitioners moved for leave to appeal to New York's highest court, the Court of Appeals, but that court denied and the Article 2 proceedings became final in early 2003. Petitioners did not seek review by this Court.

B. The Article 4 Proceeding

Almost three years later, in December 2005, SIDA initiated this proceeding under EDPL Article 4 by filing a petition seeking condemnation of specific property interests. Petitioners opposed that petition, arguing among other things that (1) the petition was untimely because it was not filed within three years of the intermediate appellate court's decision in the Article 2 proceeding, (2) the petition did not describe the

condemned property with reasonable specificity and exceeded the scope of SIDA's 2002 determination and findings, (3) the condemnation was unwarranted because the DestiNY USA project might not come to fruition, (4) SIDA's valuation of the rights taken was inaccurate.

The state trial court (Centra, J.) rejected petitioners' challenge, Pet. App. 9-16a, and the intermediate appellate court affirmed, *id.* at 1-6a. In particular, the appellate court held that (1) SIDA's Article 4 petition was timely, because the Article 2 proceeding did not become final until the Court of Appeals denied discretionary review in February 2003, *id.* at 3a, (2) "SIDA specifically identified the interests it seeks to acquire, and those interests are not vague and do not exceed SIDA's 2002 determination and findings," *id.*, (3) "the fact that a project may not ultimately come to fruition does not negate the power of eminent domain," *id.* at 4a, and (4) the trial court had not abused its discretion in determining the amount of the undertaking, *id.* at 4-5a. Justice Hurlbutt dissented, agreeing with petitioners that the Article 4 proceeding was untimely, *id.* at 5-6a, and (2) the property interests proposed to be taken "are not now ascertainable with reasonable certainty," *id.* at 6a. Petitioners unsuccessfully sought review by the New York Court of Appeals, and now file this petition.

REASONS FOR DENYING THE WRIT

I. This Case Does Not Present The "Question Presented."

As a threshold matter, this case simply does not present the "public use" issue set forth in the question presented. *See* Pet. i. Petitioners did not raise that federal constitutional issue at any stage of the proceedings below, and the state courts below did not decide any such issue. This Article 4 proceeding is about the *scope* of the proposed taking; any issues regarding the *validity* of the proposed taking (including "public use") were litigated in the earlier Article 2 proceeding. Even

the dissent below relied purely on state law, and did not address the federal constitutional argument that petitioners are now pressing. *See* Pet. App. 5-6a.

The earlier Article 2 proceeding was a completely separate and independent proceeding from this Article 4 proceeding; indeed, petitioners' lead argument below was that SIDA failed to bring this Article 4 proceeding within three years of the date the Article 2 proceeding became final. *See* Pet. App. 2-3a. And even in the earlier Article 2 proceeding, petitioners did not raise (and the state courts did not decide) any question involving the "public use" provision of the Takings Clause of the United States Constitution. Pet. App. 25-40a.

Thus, when petitioners sought review by the New York Court of Appeals in *both* this Article 4 proceeding *and* the earlier Article 2 proceeding, they expressly conceded that the intermediate appellate court's decisions are "*not* appealable as of right." Mot. for Leave to Appeal (10/4/06), at 5 (emphasis added); Mot. for Leave to Appeal (12/18/02), at 3 (emphasis added). That concession is significant because, under New York law, "[a]n appeal *may* be taken to the court of appeals as of right ... where there is directly involved the construction of the constitution of the state or of the United States." N.Y. C.P.L.R. § 5601(b)(1) (emphasis added); *cf.* N.Y. C.P.L.R. § 5602(a)(1) (appeal by permission may be taken only if the appellate decision "is not appealable as of right"). By acknowledging that they could not appeal as of right, in other words, petitioners themselves have already acknowledged that this case does not directly involve any federal constitutional question.

It follows that this Court lacks jurisdiction over this case. Petitioners have invoked this Court's jurisdiction under 28 U.S.C. § 1257(a), which authorizes this Court to review decisions from state courts where, among other things, "any title, right, privilege or immunity is ... claimed under the Constitution ... of ... the United

States." As the leading treatise explains, a party invoking this Court's jurisdiction under § 1257(a) has the burden of showing that a federal question presented to this Court "has been *either* raised in the state court *or* considered and resolved by the state court." Robert L. Stern *et al.*, *Supreme Court Practice* § 3.18, at 175 (8th ed. 2002) (emphasis in original); *see also id.* at 183 ("It is too late, of course, to raise the federal question for the first time in the petition for certiorari."). Where (as here) "the highest state court fails or refuses to pass expressly upon a federal question, the party invoking the Supreme Court's jurisdiction has the *high burden* of showing that the federal question was in fact properly raised, so that the state court's failure to deal with it was not for want of proper presentation." *Id.* at 175 (emphasis added); *see also Street v. New York*, 394 U.S. 576, 582 (1969) ("[When] the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary."). Petitioners have not shown, and cannot show, that they either raised the federal constitutional "public use" issue below or the state courts addressed that issue.

Petitioners thus fail to satisfy their obligation under this Court's Rules to:

> specif[y] ... the stage in the proceedings, both in the court of first instance and in the appellate courts, when the federal questions sought to be reviewed were raised; the manner of raising them and the way in which they were passed on by those courts; and pertinent quotations of specific portions of the record or summary thereof, with specific reference to the places in the record where the matter appears (*e.g.*, court opinion, ruling on exception, portion of court's charge and exception thereto, assignment of error), so as to show that the

> federal question was timely and properly raised and that this Court has jurisdiction to review the judgment on a writ of certiorari.

S. Ct. R. 14.1(g)(1). Although petitioners assert that they "challenged SIDA's authority to condemn their contract rights" in the courts below, Pet. 10, they cannot and do not say that such a challenge included the federal constitutional question presented in the petition. To the extent that "[p]etitioners contended that no public purpose was served and that no authority justified the excision of many rights," *id.*, they did not base that contention on the federal constitutional question they now seek to raise.

Indeed, it is telling that the most that petitioners can say, with respect to having raised that question below, is that their motion for discretionary leave to appeal in the New York Court of Appeals "cited *Kelo v. City of New London*, 545 U.S. 469, contending that the taking at issue here is far more novel and breath-taking." Pet. 11. But that motion did not raise the federal constitutional question presented in the petition. Rather, the motion sought review of the state-law issues presented to, and addressed by, the lower courts in this case, and cited *Kelo* only in support of an argument about the "*policy implications* of SIDA's exercise of eminent domain." Mot. for Leave to Appeal (10/4/06), at 15 (emphasis added; capitalization modified). Needless to say, such an offhand reference in an unsuccessful petition for discretionary review is not remotely sufficient to trigger this Court's jurisdiction to decide a federal question neither presented to, nor decided by, any of the lower state courts. Even if petitioners had actually included a federal constitutional issue in their motion for leave to appeal in the New York Court of Appeals (which they did not), that would not suffice to trigger this Court's jurisdiction:

> Where a federal question is initially raised in a petition or assignment of errors filed in the highest state court, which refuses to consider any issue not presented to the trial court, the jurisdiction of the Supreme Court cannot attach. Only if the highest state court actually considers and disposes of a question so raised can Supreme Court review be obtained.

Stern *et al.*, *supra*, § 3.18, at 181 (citations omitted).

And even putting aside the jurisdictional problem, this case hardly presents an appropriate vehicle for deciding the federal constitutional issue set forth in the petition. Needless to say, not every case within this Court's jurisdiction presents an appropriate vehicle for reviewing a federal question. To the contrary, this Court's Rule 10 explains that the Court will exercise its certiorari jurisdiction in cases arising from state courts only where, among other things, "a state court of last resort has *decided* an important federal question ..." or "a state court ... has *decided* an important question of federal law ...." S. Ct. R. 10(b), (c) (emphasis added). Here, no state court below "has decided" any federal question at all. That omission is not surprising, because petitioners presented no such question below. *See* Stern *et al.*, *supra*, § 3.18, at 175 ("[A] failure to raise a federal question often accounts for the failure of the state court to decide the matter.").

II. The "Question Presented" Is Not Worthy Of Review In Any Event.

In any event, the petition does not warrant review on the merits. In essence, petitioners do not like this Court's recent decision in *Kelo* reaffirming that a governmental entity's "public use" determination is subject only to rational-basis review by the courts. *See Kelo*, 545 U.S. at 481-83; *see also id.* at 490-91 (Kennedy, J., concurring); *Hawaii Housing Auth. v. Midkiff*, 467 U.S. 229, 241 (1984). Petitioners contend that "there is confusion and

conflict among the [lower] courts regarding how to define and analyze public use in these circumstances." Pet. 22 (capitalization modified). They are wrong.

As an initial matter, petitioners cannot establish that the decision below created or exacerbated confusion on an issue of federal constitutional law when the decision below did not decide any such issue. Thus, petitioners' assertion that "[s]ome courts, *like the New York courts here*, ... have allowed the government free rein to use its eminent domain authority" in violation of the Takings Clause, is inexplicable, because the New York courts here addressed no federal constitutional issue. Pet. 22 (emphasis added); *see also id.* at 23 (alleging that an "opinion by the Rhode Island Supreme Court [on the federal constitutional issue] simply cannot be squared with the New York courts' decisions in this case").

In any event, this Court just denied review in a case (unlike this one) that actually presented the "public use" issue that petitioners here purport to present. *See Didden v. Village of Port Chester*, 173 Fed. Appx. 931, 933 (2d Cir. 2006), *cert. denied*, 127 S. Ct. 1127 (2007) (No. 06-652). If this Court saw no reason to grant review in a case that presented the constitutional question alleged here, there is certainly no reason to grant review in a case that does not present that question.

CONCLUSION

For the foregoing reasons, this Court should deny the petition for writ of certiorari.

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(4)

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No. 06-1159

IN THE

Supreme Court of the United States

KAUFMANN'S CAROUSEL, INC., AND LORD & TAYLOR CAROUSEL, INC.,

Petitioners,

v.

CITY OF SYRACUSE INDUSTRIAL DEVELOPMENT AGENCY,

Respondent.

On Petition for a Writ of Certiorari to the New York Supreme Court, Appellate Division, Fourth Department

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SUPPLEMENTAL RULE 29.6 DISCLOSURE STATEMENT

Kaufmann's Carousel, Inc. is a wholly owned subsidiary of Federated Retail Holdings, Inc., which is 100% owned by Federated Department Stores, Inc., a publicly traded corporation.

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1. Petitioners argued in their petition that "[i]ncreasing a corporation's ability to *finance* new development by re-writing existing contracts to enhance the developer's coffers is simply a naked wealth transfer between well-heeled entities" that cannot be supported by the Public Use Clause. Pet. 12. "There is an obvious and fundamental difference between takings which aid *development* and takings which simply aid a *developer*." *Id.* at 18.

SIDA accepts this characterization of the taking's purpose here, but, remarkably, contends that such a nakedly discriminatory private purpose is a permissible "public use" under the Fifth Amendment. In its Brief in Opposition, the government states that it is free to transfer wealth to its selected private developer—so long as it receives a benefit too. SIDA Br. 19. The government reasons that because it is financing the developer's new shopping mall, "removing impediments that would hinder or increase the expense of such financing plainly benefits SIDA and the development project as a whole." *Id.* SIDA argues, in short, that the government constitutionally may rob Peter to pay Paul, so long as the government partners with Paul and shares in Paul's windfall.

This argument would make the Public Use Clause a nullity. As this Court emphasized in *Kelo*, "it has long been accepted that the sovereign may not take the property of *A* for the sole purpose of transferring it to another private party *B*, even though *A* is paid just compensation." *Kelo v. City of New London*, 545 U.S. 469, 477 (2005). Justice Kennedy, in fact, expressly noted in his *Kelo* concurrence, where there is just a "*risk* of undetected impermissible favoritism of private parties," the Constitution may require an irrebuttable presumption of invalidity. *Id.* at 493 (Kennedy, J., concurring) (emphasis added). This impermissible favoritism to one private entity is hardly *cured* because the government *shares* in the favored entity's windfall. A wealth transfer from *A* to *B* does not become acceptable

because the government favors the entity in which it has a preexisting economic stake.

To the contrary, the fact that the private favoritism is motivated by the government's parochial fiscal interests, rather than a neutral policy justification, exacerbates the constitutional problem. As the petition pointed out, this Court has repeatedly held that the government's use of its sovereign powers to further its monetary goals is illegitimate and inherently suspect. Pet. 17-19. This is a discussion that neither Respondent attempts to dispute or to distinguish. Furthermore, the Takings Clause, like the rest of the Bill of Rights, *limits* the *government's* power—it does not provide justification for the government to *increase* its power and to further its *own* benefit at the expense of a selected few. The government is not supposed to benefit from its confiscation of property; the Constitution, through the Just Compensation Clause, is designed to ensure that it does not. *See, e.g.*, *Olson v. United States*, 292 U.S. 246, 255 (1934) ("The public may not by any means confiscate the benefits . . . of the owner's bargain.").

Even more brazenly, SIDA contends that the Court may not even examine the taking's purpose because it is constitutionally irrelevant. SIDA Br. 20. Under the government's view, this Court may only ask whether the overall project is beneficial to the public. *See id.* at 19. The government contends the purpose of any individual taking is a matter of state law, so the Constitution and this Court have *no* role in assessing the "necessity and scope of a potential taking," and may not inquire whether the specific property confiscations serve any public purpose. *Id.* at 20.

This argument cannot be reconciled with the Constitution's text or this Court's precedent. The constitutional question is whether the "*taking*" serves a "public use" and the "taking" here rewrites Petitioners' contracts to benefit the favored private developer. If this taking of private contract rights serves no public purpose, it

is impermissible regardless whether the project would be beneficial. As this Court reaffirmed in *Kelo*, the government may not use the pretext of a public purpose "when its actual purpose was to bestow a private benefit."[1] *Kelo*, 545 U.S. at 478.

Here, the "takings" were not needed to develop the property, but simply to financially benefit the developer, which is not a public purpose. The government's so-called "impediments" at issue here, *see* SIDA Br. 19—otherwise known as Petitioners' property rights—are not provisions that would preclude the developer from expanding its mall. The mall could be built in exactly the same way, whether or not Petitioners' rights were confiscated. The government does not and cannot contend otherwise. The contractual rights that were taken merely protect Petitioners from the developer arbitrarily imposing new financial burdens. For example, they cap the amount of PILOT payments that may be imposed on Petitioners and prohibit the developer from mortgaging Petitioners' buildings or using them as collateral. Pet. App. 13a-14a. These rights are no different than the standard rights in a home mortgage which set a fixed monthly payment and protect a homeowner from the bank using the home as collateral in other transactions.

The government has no legitimate public purpose in conscripting its citizens into a private developer's servitude by allowing a private developer to use citizens' property as collateral for a shopping mall and to unilaterally increase the amount of payments they must make. It is inconceivable, for example, that the Court would have allowed the government to rearrange Ms. Kelo's mortgage so that Pfizer could use

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[1] This petition has nothing to do with whether one of the "twigs in the bundle of rights that is property" can be plucked out, as the government suggests. SIDA Br. 18. Petitioners' point is that *no matter* the nature of the property taken, it must be taken for a public use.

her home as collateral in its project or to increase her monthly payments.

2. The government's arguments and the state court decisions here cannot be squared with this Court's precedent, including *Kelo*. No matter how the government attempts to spin the struggles of the lower federal and state courts, the courts have evidenced a great deal of confusion regarding the appropriate legal standard to apply to government self-dealing and the required connection between the government's taking and the purported public interest. These courts have relied on this Court's opinions interpreting the federal Constitution, *see, e.g.*, *Didden v. Village of Port Chester*, 173 F. App'x 931, 933 (2d Cir. 2006), *cert. denied*, 127 S. Ct. 1127 (2007); *R.I. Econ. Dev. Corp. v. Parking Co.*, 892 A.2d 87, 96 (R.I. 2006), and have reached irreconcilable decisions.[2] Simply because the precise factual situation has not occurred—no other state entity has acted as boldly or unapologetically as SIDA—does not suggest there is no split of authority or confusion regarding the legal standards underlying the Takings Clause. *See* SIDA Br. 11. Every case has different facts; the important question is which legal standards are appropriate and whether the results under those standards can be reconciled. The cases cited by Petitioners evidence such confusion and demonstrate the need for this Court's action. Pet. 22-26.

3. Respondents attempt to obfuscate the merits of the petition by focusing on perceived "vehicle problems," contending Petitioners ought to have more clearly raised their constitutional claims. Petitioners, however, provided the New York state courts a fair and full opportunity to

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[2] The Respondents themselves can not even agree on the meaning of these cases. SIDA contends that *Didden* did not reach the issue of a taking, *see* SIDA Br. 13-14, whereas Carousel Center asserts that *Didden* "presented the constitutional question alleged here." *See* Car. Ctr. Br. 9.

address the constitutional issues raised by SIDA's actions, and in fact, the Appellate Division did address these issues. *See* Pet. App. 36a-38a. Nothing more was required. *See Eddings v. Oklahoma*, 455 U.S. 104, 113 n.9 (1982) (The Court's jurisdiction "does not depend on citation to book and verse."). As this Court has held, to preserve a constitutional challenge, "no particular form of words or phrases is essential, but only that the claim of invalidity on the ground therefor be brought to the attention of the state court with fair precision and in due time." *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 85 n.9 (1980) (internal quotation marks omitted). In such cases, "if the record as a whole shows either expressly or by clear intendment that this was done, the claim is to be regarded as having been adequately presented." *Id.* (internal quotation marks omitted).

This Court, for example, has concluded that federal due process claims were preserved even where the argument was presented solely in terms of state law to the state court. *See Wood v. Georgia*, 450 U.S. 261, 265 n.5 (1981) (even though the claim "was not raised on appeal below or included as a question in the petition for certiorari," the issue was pointed out to the trial court, and the petitioner's adversary was on notice). Likewise, in a takings case, *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155 (1980), generalized "due process" arguments under "the Florida Constitution and its Federal counterpart," which persuaded the Florida Supreme Court to find "no unconstitutional taking," were "a sufficient base for this Court's consideration of the federal issue." *Id.* at 159 n.5 (internal quotation marks and emphasis omitted). Petitioners' federal claims were presented at least as well as these cases.

The only reason the constitutional issues were not more cleanly raised and addressed was because of state law which purported to bar, without exception, Petitioners from raising the constitutional arguments after the government specified the property it was going to take. *See* N.Y. E.D.P.L. § 208; Car. Ctr. Br. 4; SIDA Br. 11. New York requires a

trifurcated procedure when the government takes property. In the first phase, the government must determine the need for the project, including the public use to be served. *See* N.Y. E.D.P.L. §§ 203, 204. The government need not specify the property interests that are being taken; it merely must justify the overall project itself. All constitutional challenges must be made in this proceeding, even though a property owner does not know exactly what property interests the government will try to take. *See id.* § 207. In the second phase, the government defines the property that will be taken by filing an acquisition map, which effects transfer of title, but precludes constitutional challenges to the specific taking. *See id.* §§ 208, 402. In the third phase, just compensation is determined and awarded.[3] *See id.* §§ 501-514.

The history here demonstrates that Petitioners did everything they could within this procedure to challenge SIDA's taking. In 2002, in the first proceeding, Petitioners and co-plaintiff, J.C. Penney Corp., argued that the developer's proposed mall expansion would not serve a public purpose. J.C. Penney expressly contended the taking violated the federal Constitution, and Petitioners contended that the public use requirement in the EDPL, which cannot be interpreted less restrictively than the Constitution's Public Use Clause,[4] was not served, *see* J.C. Penney App. Div. Br. at 19-21; Petrs.' App. Div. Br. at 30-33 (July 22, 2002); Petrs.' App. Div. Reply Br. at 7-10 (Sept. 11, 2002). These arguments were both addressed and rejected by the New

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[3] These proceedings, which build on one another and must follow in this sequence, are far from "completely separate and independent proceeding[s]" as Carousel Center asserts. Car. Ctr. Br. 5.

[4] *See Manocherian v. Lenox Hill Hosp.*, 643 N.E.2d 479, 482 (N.Y. 1994) ("The precedents, State and Federal, thus establish a constitutional minimum floor of protection which this Court lacks authority to diminish under the Supremacy Clause.").

York Appellate Division, which understood that SIDA was seeking to take consent rights, *i.e.*, those rights that prohibited the DestiNY project from proceeding.[5] *See* Pet. App. 36a-38a. Petitioners and J.C. Penney thereafter sought relief in the Court of Appeals—J.C. Penney sought such appeal as a matter of right but the Court of Appeals denied the application presumably for lack of a colorable constitutional claim. *See id.* at 10a. The state courts thus not only had the opportunity to address the constitutional issues, the appellate court actually did address the issues and the Court of Appeals rejected them as meritless. No petition was filed with this Court because, as the rights to be taken were not specified, the claim was not ripe for federal review. *See, e.g.*, *Pennell v. City of San Jose*, 485 U.S. 1, 10 (1988) (explaining that Takings Clause challenges should be raised "in an actual factual setting that makes such a decision necessary") (internal quotation marks omitted).

Following this Court's decision in *Kelo*, in the second phase, SIDA specified the contractual rights that it was taking. In addition to the consent rights, SIDA for the first time sought to take certain financing provisions, which had nothing to do with the ability to expand the developer's shopping mall and served only to reduce the developer's costs of borrowing. *See* Pet. 8-11; Petrs.' App. Div. Br. at 14-19 (arguing that SIDA's current attempted takings "encompass interests far in excess of [those] referenced in SIDA's 2002 Determination and Findings and far in excess of the interests for which any showing of public necessity has been made"). As noted *supra*, New York law precluded Petitioners from reasserting the constitutional claims raised in the first instance, and thus Petitioners could only contend

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[5] Under New York law, an issue of law is preserved for review so long as the lower court addresses it. *Seitelman v. Lavine*, 325 N.E.2d 523, 525 n.2 (N.Y. 1975); *Servidori v. Mahoney*, 515 N.Y.S.2d 328, 329 (App. Div. 1987).

that the prior findings and determinations did not justify taking these rights.[6] Had Petitioners succeeded, they would have been entitled to another constitutional hearing before their rights were taken. But the Appellate Division rejected Petitioners' arguments and held SIDA's inclusion of the financial provisions "d[id] not exceed SIDA's 2002 determination and findings." Pet. App. 3a. This determination necessarily reaffirmed the constitutional holding in the context of the specific property rights at issue, and for the first time established a fully ripe federal claim.[7]

Petitioners again raised their constitutional claims in their appeal to the Court of Appeals in 2006, pointing to the taking in this case as unjustified even under the standard of *Kelo*. Pet. 11; Petrs.' Mot. for Leave to Appeal at 15-18 (Oct. 4, 2006). That Petitioners sought leave to appeal rather than filing an appeal as a matter of right was not an "admission" that their arguments did not raise any constitutional claims, as Respondents assert, but rather was dictated by New York law: where a decision involves constitutional and non-constitutional grounds for review, an appellant *should* seek leave to appeal rather than appeal as a right to avoid outright dismissal. *See Winters v. Lavine*, 574 F.2d 46, 61-63 (2d Cir. 1978) (holding that appellant waived constitutional argument by attempting to appeal as matter of right when non-constitutional grounds were also involved

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[6] Under the law of the case doctrine, the Appellate Division also was precluded from reconsidering its constitutional decisions once it rejected Petitioners' state law claims. *See Telaro v. Telaro*, 255 N.E.2d 158, 159-60 (N.Y. 1969). Nevertheless, Petitioners did argue that SIDA's proposed actions would be "defective *and* unconstitutional." Petrs.' App. Div. Br. at 14, 19 (July 13, 2006) (emphasis added).

[7] Petitioners need not wait until the third phase to seek federal review because all of the facts necessary for review of "public use" have been established. *See, e.g., Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 543 (2005).

and noting that appellant could have "presented anew the first amendment issue on [a permissive appeal] to the Court of Appeals"); *see also* N.Y. JURIS., *Appellate Review* § 74 (2d ed. 2007) ("[W]here there is any doubt whether a constitutional question is the sole point involved, sound practice warrants an application for permission to appeal."). Such a procedure was particularly appropriate here because an appeal as a matter of right would have been futile. The Court of Appeals had already rejected an appeal as of right, and state law purported to prohibit constitutional challenges in the second proceeding.[8] Pet. App. 10a, 18a. Contrary to Respondents' claims, the chosen procedure was the most appropriate procedure and actually increased the chance for additional state court review of the constitutional issues.[9]

Finally, any failure to preserve the precise issues at hand was due to the inadequate state procedures, which cannot deny this Court review. This Court will disregard allegedly independent state grounds when the state rules in question have not afforded "a reasonable opportunity to assert federal rights, without placing unreasonable obstacles in the way." 16B Charles A. Wright, et al., *Federal Practice and Procedure* § 4027, at 392 (1996 & 2007 update); *see also Lee v. Kemna*, 534 U.S. 362, 376 (2002) (rejecting state rules as inadequate state grounds to bar review of federal due process claim); *Davis v. Wechsler*, 263 U.S. 22, 24 (1923) (Holmes, J.) ("Whatever springes the State may set for those

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[8] *Parker v. Illinois*, 333 U.S. 571 (1948), is not applicable. There, the petitioner made "a choice which involved abandonment of the constitutional issues which he had raised in the proceedings." *Id.* at 575. Petitioners, as demonstrated above, did not abandon their claims under New York law by their choice of procedure.

[9] Contrary to the government's, again, unfounded suggestion, this Court regularly grants petitions for certiorari to review decisions from state intermediate appellate courts. *See, e.g., Cunningham v. California*, 127 S. Ct. 856 (2007) (Court of Appeals of California).

who are endeavoring to assert rights that the State confers, the assertion of federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice."). New York law falls in this category of inadequate procedures, as it prohibited Petitioners from challenging, in Carousel Center's words, the "scope" of the taking. Car. Ctr. Br. 1, 4. If this state rule is viewed as precluding constitutional challenges to the specific, completed taking, as Respondents maintain, it would effectively insulate the "scope" of every government taking from federal review. By the time the taking's "scope" becomes sufficiently clear to be ripe for federal review, under Respondents' niggardly interpretation of state law, it is too late to raise the constitutional challenge. This plainly cannot be. The government's transparent effort to distract the Court from the merits of the petition should be rejected.[10]

A clear constitutional error occurred here. Governments, as demonstrated by SIDA's Brief in Opposition, have become emboldened after *Kelo* to expressly further their own interests and the interests of selected private parties to the detriment of a few. These questions of immense national importance should be resolved now without waiting for the repeated trampling of constitutionally protected rights, which can never be restored.

CONCLUSION

The petition for a writ of certiorari should be granted.

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[10] SIDA further attempts to confuse the issue by suggesting in a footnote that Lord & Taylor lacks standing. First, there is no dispute that Kaufmann's has standing and can assert the claims raised. This court thus has jurisdiction over the petition. Second, New York and federal rules do not require the substitution of a party after a transfer of interest. N.Y. C.P.L.R. § 1018; FED. R. CIV. P. 25(c); FED. R. APP. P. 43. Finally, Counsel spoke to the Clerk's Office regarding this issue and was told no additional action was likely necessary, but that the Clerk's Office would inform Counsel if it was.

Respectfully submitted,

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